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UNIVERSITY OF ALBERTA

THE ABOLITION OF THE CROWN PREROGATIVE OF PRIORITY BY SECTION 15 OF THE CHARTER

BY

GERALD D. CHIPEUR ©

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS.

FACULTY OF LAW

EDMONTON, ALBERTA
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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled THE ABOLITION OF THE CROWN PREROGATIVE OF PRIORITY BY SECTION 15 OF THE CHARTER submitted by GERALD D. CHIPEUR in partial fulfilment of the requirements for the degree of Masters of Law.

DATE: June 28, 1990

DEDICATION

To my children, Stephanie and Lauren, and to the hope that they will inherit a free and democratic society -- a society in which it is recognized that all individuals are created equal and in which exists the spirit of liberty.

ABSTRACT

This thesis considers the question of whether the prerogative of the Crown of priority in the collection of debts of equal degree is inconsistent with the guarantee of equality found in section 15 of the Canadian Charter of Rights and Freedoms. It concludes that the Crown prerogative of priority is not consistent with section 15 and that such prerogative is not a reasonable limit demonstrably justifiable in a free and democratic society under section 1 of the Charter.

The thesis first investigates the origins of the Crown prerogative in general and then the prerogative of priority in particular. It comes to the conclusion that the prerogative of priority developed during the middle ages as a recognition of the personal sanctity and pre-eminence of the monarch. This concept is summarized in the latin phrase *detur digniori* -- "let it be given to the worthier."

The thesis goes on to identify the principles of interpretation which govern the application of section 15 of the Charter and to apply section 15 to the Crown prerogative of priority.

One principle of Charter interpretation is that a law will be held in violation of the Charter if either its purpose or its effect is inconsistent with a Charter right or freedom. The thesis submits that the purpose of the prerogative priority is to recognize the medieval concept of the personal pre-eminence and superiority of the Queen over her subjects. Such a purpose is inimical to the values promoted by the guarantee of equality found in section 15 of the

Charter.

The thesis concludes that a common law rule granting priority to the Queen solely on the basis of her royal birth cannot be justified in a free and democratic society under section 1 of the Charter. Society has long disregarded the medieval political system as a valid model for society. The thesis suggests that section 15 of the Charter requires that this vestige of medieval society now be abandoned as well.

PREFACE

Section 15 of the Canadian Charter of Rights and Freedoms ("Charter") in broad and comprehensive language guarantees to individuals in Canada the right to equality. Section 15 leaves no doubt that equality in every form in which it can be enjoyed is to be promoted by the Charter. Like the four points of a compass, the four equality rights guaranteed in section 15, represent the full range of meaning which can be given to the concept of equality. Every perspective is included.

Historically, one of the most important aspects of the principle of equality has been the proposition that there should be equality between governed and governor. This conviction led Thomas Jefferson to include these words in the Declaration of Independence:

> We take these truths to be self-evident, That all men are created equal. That they are endowed by the Creator with certain inalienable rights; that amongst these are Life, Liberty, and the Pursuit of Happiness. That to secure these rights Governments are instituted among men, deriving their just powers from the consent of the governed.

Jefferson's statement that "all men are created equal" was indeed revolutionary. The principle of equality was foreign to a world of kings and subjects, to societies made up of titled classes and lower classes. Royalist lawyers writing a century earlier would have acknowledged that "By the Law of Nature all things were common and all persons equal."[1] The emphasis, however, was on the word "were." They believed that when society organized "the Law of Nations ... brought in Kings and Rulers [and] took away equality of persons."[2]

Jurists in the thirteenth century thought that equality was inconsistent with authority: "Subjects cannot be the equals of the ruler, because he would thereby lose his rule, since equal can have no authority over equal."[3] Society has changed over the last seven hundred years. Authority in Canada today is based upon equality. The principle of equality is an important part of the right to vote and hold elected office guaranteed in section 3 of the Charter.[4] For Thomas Jefferson, the idea that "all men are created equal" led to the further "truths" that they were entitled to life, liberty and the pursuit of happiness and that a just government only governed with the consent of the people. Justice Learned Hand confirmed that equality was essential to liberty in a speech given in Central Park, New York City, on May 21, 1944:

---

[1] J. Davies The Questions Concerning Impositions 29 (1656).

[2] J. Davies The Questions Concerning Impositions 29 (1656).

[3] 2 Bracton on the Laws and Customs of England 33 (S. Thorne trans., ed. 1968).

[4] Dixon v. British Columbia, [1989] 4 W.W.R. 393, 405-07 (B.C.C.A.)("equality of voting power is fundamental to the Canadian concept of democracy").

> What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.[5]

The principle of equality is an important part of the ideal free and democratic society referred to in section 1 of the Charter. Equality is a necessary foundation for freedom and democracy.[6] Section 15 of the Charter directs lawmakers, both legislators and judges, to closely scrutinize inequality within society. Section 1 read in conjunction with section 52 then requires abandonment of all laws which create inequality and are not demonstrably reasonable in a free and democratic society. The prerogative priority of the Crown for first payment of debts is such a law. It cannot survive Charter scrutiny.

This paper will review the origin of the Crown prerogative in general and the prerogative of priority in particular. It will then consider the statutory modifications to the Crown prerogative of priority, commencing with the great charter, Magna Carta, and concluding with another charter, the Canadian Charter of Rights and Freedoms. It will be the thesis of this paper that the Crown prerogative of priority is inconsistent with section 15 of the Charter and that the priority, originally justified on the basis of the superior dignity or worth of the Crown, cannot now be justified in a free and democratic society which places such a high value on the principle that all are equal.

---

[5] L. Hand The Spirit of Liberty 190 (1960).

[6] K. Fogarty Equality Right and Their Limitations in the Charter 1 (1987) (citing 1 A. de Tocqueville Democracy in America 41 (10th ed. 1966) ("It has been said that equality is the foundation on which all rights are based.").

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CHAPTER ONE

THE CROWN IN THE CONSTITUTION OF CANADA

Canada is a constitutional monarchy. It is also a democracy. Canada is a constitutional monarchy because the Crown is subject to the law, and a democracy because the law is subject to the people. In the preamble to the Constitution Act, 1867 the provinces which united into the nation of Canada expressed a desire to be "federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom."

The executive government and authority of and over Canada is vested in the Queen. The Queen of England is also the Queen of Canada. Section 9 of the Constitution Act, 1867 declares that the executive government and authority is to "continue" in the Queen. After confederation, the Queen's rights and prerogatives continued to extend in Canada in like manner as they did in England.[1]

Notwithstanding the extensive legal powers given to the Queen under the Constitution of Canada, the Queen has little or no personal role in the actual government of Canada. There are two reasons for this. The first is that, by virtue of section 12 of the Constitution Act, 1867, the Governor General represents the Queen in Canada and performs most of the functions of the Queen.[2] Second, as a matter of constitutional convention, the Queen does not, even in England, independently exercise the extensive legal powers, including the prerogative powers, allowed to her under the common law.

---

[1] The Queen v. Bank of Nova Scotia, 11 S.C.R. 1, 10 (1885); A. Lefroy Canada's Federal System 21 (1913); The Queen v. Operation Dismantle, [1983] 1 F.C. 745, 780 (C.A.) aff'd [1985] 1 S.C.R. 441; The Queen v. Secretary of State, [1982] 2 All E.R. 118, 136 (C.A.).

The nature of constitutional convention is described in detail in the majority decision of the Supreme Court of Canada in Re: Resolution to Amend the Constitution.[3] Before defining the nature of a constitutional convention the Supreme Court identified the constituent legal parts of the Constitution of Canada:

> A substantial part of the rules of the Canadian constitution are written. They are contained not in a single document called a constitution but in a great variety of statutes some of which have been enacted by the Parliament at Westminster, such as the *British North America Act, 1867*, 1867 (U.K.), c. 3, (the *B.N.A. Act*) or by the Parliament of Canada, such as the *Alberta Act*, 1905 (Can.), c. 3, *The Saskatchewan Act*, 1905 (Can.), c. 42, the *Senate and House of Commons Act*, R.S.C. 1970, c. S-8, or by the provincial legislatures, such as the provincial electoral acts. They are also to be found in orders in council like the Imperial Order in Council of May 16, 1871 admitting British Columbia into the Union, and the Imperial Order in Council of June 26, 1873, admitting Prince Edward Island into the Union.

---

[2] The Crown is also represented in each province by the Lieutenant Governor of the province by virtue of section 12 of the Constitution Act, 1867.

[3] [1981] 1 S.C.R. 753, 876-84.

> Another part of the Constitution of Canada consists of the rules of the common law. These are rules which the courts have developed over the centuries in the discharge of their judicial duties. An important portion of these rules concerns the prerogative of the Crown. Sections 9 and 15 of the *B.N.A. Act* provide:
>
> > 9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.
> >
> > 15. The Commander-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.
>
> But the Act does not otherwise say very much with respect to the elements of "Executive Government and Authority" and one must look at the common law to find out what they are, apart from authority delegated to the executive by statute.
>
> The common law provides that the authority of the Crown includes for instance the prerogative of mercy or clemency and the power to incorporate by charter so as to confer a general capacity analogous to that of a natural person. The royal prerogative puts the Crown in a preferred position as a creditor or with respect to the inheritance of lands for defect of heirs or in relation to the ownership of precious metals and *bona vacantia*. It is also under the prerogative and the common law that the Crown appoints and receives ambassadors, declares war, concludes treaties and it is in the name of the Queen that passports are issued.
>
> Those parts of the Constitution of Canada which are composed of statutory rules and common law rules are generically referred to as the law of the constitution.[4]

It is important to note that it is the system of the common law rather than any specific rule thereof which is part of the Constitution. Otherwise, every common law rule which has been developed by the courts over the centuries would be etched in constitutional stone, incapable of change except by amendment to the Constitution.

---

[4] Re: Resolution to Amend the Constitution, [1981] 1 S.C.R. at 876-77.

Constitutional conventions, though not enforceable in court, are just as important to the workings of government in Canada as is the "law of the constitution" described above. The significance of constitutional conventions to Canada's political system was explained by the Supreme Court of Canada as it continued its description of the content of the Canadian Constitution in Re: Resolution to Amend the Constitution:

> But many Canadians would perhaps be surprised to learn that important parts of the constitution of Canada, with which they are the most familiar because they are directly involved when they exercise their right to vote at federal and provincial elections, are nowhere to be found in the law of the constitution. For instance it is a fundamental requirement of the constitution that if the opposition obtains the majority at the polls, the government must tender its resignation forthwith. But fundamental as it is, this requirement of the constitution does not form part of the law of the constitution.
>
> It is also a constitutional requirement that the person who is appointed prime minister or premier by the Crown and who is the effective head of the government should have the support of the elected branch of the legislature; in practice this means in most cases the leader of the political party which has won a majority of seats at a general election. Other ministers are appointed by the Crown on the advice of the prime minister or premier when he forms or reshuffles his cabinet. Ministers must continuously have the confidence of the elected branch of the legislature, individually and collectively. Should they lose it, they must either resign or ask the Crown for a dissolution of the legislature and the holding of a general election. Most of the powers of the Crown under the prerogative are exercised only upon the advice of the prime minister of the cabinet which means that they are effectively exercised

by the latter, together with the innumerable statutory powers delegated to the Crown in council.

Yet none of these essential rules of the constitution can be said to be a law of the constitution. It was apparently Dicey who, in the first edition of his *Law of the Constitution*, in 1885, called them the "conventions of the constitution", (see W.S. Holdsworth, "The Conventions of the Eighteenth Century Constitution" (1932), 17 Iowa Law Rev. 161), an expression which quickly became current. What Dicey described under these terms are the principles and rules of responsible government, several of which are stated above and which regulate the relations between the Crown, the prime minister, the cabinet and the two Houses of Parliament. These rules developed in Great Britain by way of custom and precedent during the nineteenth century and were exported to such British colonies as were granted self-government.

...

We respectfully adopt the definition of a convention given by the learned Chief Justice of Manitoba, Freedman C.J.M., in the Manitoba Reference, *supra*, at pp. 13-14:

> What is a constitutional convention? There is a fairly lengthy literature on the subject. Although there may be shades of difference among the constitutional lawyers, political scientists, and Judges who have contributed to that literature, the essential features of a convention may be set forth with some degree of confidence. Thus there is general agreement that a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other. There is general agreement that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom. There is also general agreement that "a convention is a rule which is regarded as obligatory by the officials to whom it applies". Hogg, *Constitutional Law of Canada* (1977), p. 9. There is, if not general agreement, at least weighty authority, that the sanction for breach of a convention will be political rather than legal.

It should be borne in mind however that, while they are not laws, some conventions may be more important than some laws. Their importance depends on that of the value or principle which they are meant to safeguard. Also they form an integral part of the constitution and of the constitutional system. They come within the meaning of the word "Constitution" in the preamble of the *British North America Act, 1867*:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united ... with a Constitution similar in Principle to that of the United Kingdom.[5]

The Constitution Act, 1867 identifies the executive in Canada as the Queen[6] and creates the Queen's Privy Council to aid and advise in the government of Canada.[7] However, the written part of the Constitution goes no further. Responsible government is only assured through constitutional convention. By convention, the Queen normally acts on the advice of her Privy Council and more specifically the ministers of the Crown.[8] While the Queen is chief executive officer of Canada, it is her cabinet which, in most cases, actually exercises executive authority in Canada.[9] This does not, however, mean that the Queen is dispensible. The Queen as chief executive is more than a convenient working hypothesis; she is absolutely essential to the parliamentary form of government adopted by Canada. The key role played by a monarch in a parliament was illustrated recently in the actions of the king and parliament of Belgium on April 3, 4 and 5, 1990:

---

[5] Re: Resolution to Amend the Constitution, [1981] 1 S.C.R. at 877-83. See also Lord Denning What Next in the Law 313 (1982) ("conventions -- ... have virtually the force of law").

[6] Constitution Act, 1867, section 9.

[7] Constitution Act, 1867, section 11.

[8] P. Hogg Constitutional Law of Canada 11 (2d ed. 1985).

[9] 6 W. Holdsworth A History of English Law 263 (3rd ed. 1923).

> "The king stepped down temporarily after refusing to sign a new law which for the first time legalises abortion in Belgium. The law has just been approved by both houses of parliament.
>
> At a late-night cabinet meeting on April 3rd the government decided, as it is allowed to under Article 79 of the constitution, that the king was temporarily incapable of ruling; it promulgated the abortion law in his absence from the throne. At the same time, using Article 82, it called a special joint session of the two houses of parliament for April 5th in order to offer him his job back.[10]

The king of Belgium could not be ignored. It was necessary for the government to take action which was constitutional in nature before it could promulgate a law without royal assent.

Because the exercise of the executive power in Canada is governed by convention[11] the real decisionmaker or chief executive may not always be apparent. It would be necessary to closely examine the domestic politics of the day to determine who is responsible for the actions of a government official purporting to speak or act in the name of the Queen.[12] Before mid-twentieth century it would have been necessary to examine not only the domestic politics of Canada but also, with respect to some issues, the domestic politics of the United Kingdom in order to answer this question. Until that time, the conduct of foreign affairs for Canada and the final judicial authority on Canadian law remained in the hands of the Queen's Privy Council for Great Britain.[13]

---

[10] "Not king for a day" The Economist April 7, 1990 at 61. See also "Kiss a frog" The Economist April 14, 1990 at 18.

[11] P. Hogg Constitutional Law of Canada 12 (2d ed. 1985).

Professor Hogg, in his book Liability of the Crown, accurately sets forth the present status of the Crown:

> What is meant by "the Crown"? "The crown as an object is a piece of jewelled headgear under guard in the Tower of London. But it symbolizes the powers of government which were formerly wielded by the wearer of the crown". Although we now have a "constitutional monarchy", in which the role of the Queen (and of her representatives in the Commonwealth countries) has become almost entirely formal, the term "the Crown" has persisted as the name for the executive branch (but not the legislative branch) of government. Executive power is actually exercised by the Prime Minister and the other Ministers who direct the work of the civil servants in the various government departments. This structure is accurately and commonly described as "the government" or "the administration " or "the executive", but lawyers usually use the term "the Crown".[14]

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[12] See Pollock "Notes" 13 L.Q.R. 229 (1897) ("The prerogatives of the Crown mean at the present time nothing but the power of party leaders"). See also H. Evatt The Royal Prerogative 7 (1987) ("no branch of our law is so vague as that which relates to the legal status of the executive of the Crown").

[13] W. Lederman Continuing Canadian Constitutional Dilemmas 79 (1981); Ontario v. Canada, [1947] A.C. 127 (P.C.) (Can.).

[14] P. Hogg Liability of the Crown 9 (2d ed. 1989).

While it is true that the Queen, in practice, has little personal power or authority, the common law continues, in theory, to vest extensive powers and privileges in her hands.

Some of the most extensive powers and privileges of the Queen are her prerogative powers and immunities. The ministers of the Crown can only exercise the prerogative powers in the name of the Queen by relying upon the ancient legal theories or legal fictions which lie at the heart of our parliamentary form of government. When exercising the prerogative, the ministers of the Crown do not rely upon a democratically bestowed power but, rather, upon a monarchially assumed privilege.[15] The powers of the monarch, developed and exercised at a time when England was under a true monarchy, are used today in a democracy by a popularly elected government in the name of the monarch. Canada has the substance of a democracy but the form of a monarchy.

In his Inquiry into the Rise and Growth of The Royal Prerogative in England, John Allen highlighted the nature of the legal fiction fundamental to the form of government adopted by Canada:

---

[15] 2 W. Stubbs The Constitutional History of England 541 (4th ed. 1897).

> [I]n the contemplation of law the sovereignty and undivided power of the state are in the King.
>
> It is not my intention to dispute the truth or reality of this view of the constitution of England. However hazardous it may appear to make the rule and government of a great nation depend on the life and health of a single individual, subject to all the casualties and infirmities of human nature; however extravagant it may seem to attribute to one member of the community, as chief and representative of the commonwealth, the entire power and authority of the whole; there cannot be a doubt that such is the constitution of England, as laid down most strongly and emphatically in the works of lawyers, and in the homilies of churchmen.
>
> ...
>
> But though these doctrines are in practice harmless, the wonder is not the less how they were first invented, and through what means they found admission into the law of England, so justly celebrated for its regard to the property and liberties of the people. The subject, though curious, seems to me to have attracted less attention from those who have traced the process of our constitution, than its importance as an historical question deserves.
>
> ...
>
> The King has been invested by law and religion with a character at once despotic and divine. His office has been deemed sacred as a delegation from Heaven, and the sacredness of his office has been communicated to his person. In law, his prerogative has been held to be the same with that claimed or possessed by the Roman Emperors.[16]

---

[16] J. Allen Inquiry into the Rise and Growth of The Royal Prerogative in England 6-8 & 24 (1849). See also F. MacKinnon The Crown in Canada 15-16, 69, 75, 78 & 88 where it is asserted that political reality has replaced legal reality and that the Queen merely "lends her name" to Canada.

CHAPTER TWO

THE NATURE OF THE CROWN PREROGATIVE

A. The Prerogative Defined

Most authorities refer to volume one of William Blackstone's Commentaries on the Laws of England[17] as the starting point for any discussion of the Crown prerogative. Blackstone wrote:

> By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity ... . It can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects.[18]

The Dictionary of English Law refers to Blackstone and to Lord Coke's commentary on Littleton when defining the prerogative as "those exceptional powers, pre-eminences and privileges which the law gives to the Crown (Co. Litt. 90b; 1 Bl. Comm. 239)."[19] The law was even more concise at the time of

---

[17] (1st ed. 1765).

[18] 1 W. Blackstone Commentaries on the Laws of England 233 (1st ed. 1765).

[19] 2 Dictionary of English Law 1410 (1977).

Edward I. At that time the term was personified in the saying "the king is prerogative."[20]

In Attorney General v. De Keyser's Royal Hotel[21] the House of Lords turned to Professor A.V. Dicey for assistance in defining the royal prerogative. Lord Dunedin wrote that: "The prerogative is defined by a learned constitutional writer as 'The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.' " Professor Dicey's definition of the prerogative has also been adopted by the Supreme Court of Canada. In Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy upon Deportation Proceedings[22] Chief Justice Duff, speaking on behalf of the court, said:

> The nature of prerogative is, in our opinion, rightly set forth by Mr. Dicey at p. 420 of his Law of the Constitution (8th ed.):
>
> > The "prerogative" appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the crown. The king was originally in truth what he still is in name, "the sovereign," or, if not strictly "sovereign" in the sense in which jurists use that word, at any rate by far the most powerful part of the sovereign power.

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[20] 1 F. Pollock & F. Maitland The History of English Law Before the Time of Edward I 512 (2d ed. 1898).

[21] [1920] A.C. 508, 526.

[22] [1933] S.C.R. 269, 272-73.

In the ninth edition of his book Professor Dicey wrote:

> The prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers. Every act which the executive of government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative.[23]

The description of the prerogative set forth by the Federal Court of Appeal in The Queen v. Operation Dismantle[24] expands upon professor Dicey's definition referred to above:

> It is well known that, historically, the *royal prerogative* is what has been left to the King from the wide discretionary powers he enjoyed at the time he governed as an absolute monarch, powers which the great statutes of the constitutional history of England -- among which those expressly referred to by the learned Judge in his decision, the *Bill of Rights 1688*, 1 Will. & Mar. Sess. 2 c. 2 and the *Act of Settlement 1700*, 12 & 13 Will. 3 c. 2 -- were aiming at defining and containing by proceeding to solemn declarations of the fundamental laws of England. The idea that certain privileges, freedoms and powers remained directly associated with the dignity and responsibility of the Crown persisted even after the royal authority had become totally subject to the supremacy of Parliament, except that these royal prerogatives were then seen as arising out of the common law and their content, not defined *a priori*, became subject to the will of the elected representatives of the people, free to intervene at any time to clarify or limit their extent.

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[23] A. Dicey Law of the Constitution 425 (9th ed. 1939).

[24] [1983] 1 F.C. at 779.

Halsbury's Laws of England sets forth a fairly comprehensive definition of the royal prerogative:

> The royal prerogative may be defined as being that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her regal dignity, and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England. ...
>
> 1 Historically it is incorrect to say that the prerogative is "created" by the common law, because it is the residue of royal authority left over from a time before it was effectually controlled by law; but since the time of Bracton, who founded the royal authority on law, it has been legally correct to use that term.[25]

While definitions set forth by the courts and writers over the years are useful in helping to understand the nature of the prerogative, Holdsworth was probably most accurate when he said that it is impossible to define the prerogative completely by any theory:

> It has been very truly said that, in the Middle Ages, the royal prerogative often appears to be simply some advantage over the subject which the law gives to the king when their rights conflict.
>
> ...
>
> In fact, the prerogative is the oldest part of the constitution, and the law which centers around it bears upon it the marks of all the varied phases through which the constitution has passed. It is this fact which gives to

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[25] 8 Halsbury's Laws of England 583 & n.1 (4th ed. 1974).

> it its "peculiar import," and makes it impossible to define it completely "by any theory of executive functions."[26]

Most writers agree on what the major prerogative powers of the Crown are. However, there are minor differences between the definitions offered by each writer as succinct and accurate outlines of the extent of the prerogative. Earlier writers tended to define the prerogative in broader terms. In 1854 Bacon said that "Prerogative is a word of large extent, including all the rights and privileges which by law the king hath, as head and chief of the commonwealth, and as entrusted with the execution of the *laws*."[27] The 1903 edition of Stephen's Commentaries on the Laws of England defined the prerogative more narrowly:

> The prerogative may be more preciously defined as "the discretionary authority of the executive" (Anson, Law and Custom, vol. ii, p. 2), ie., everything which the king or his servants may do without the authority of an Act of Parliament."[28]

Professor de Smith proposed a similar definition in Constitutional and Administrative Law:

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[26] 3 W. Holdsworth A History of English Law 329 & 459 (3rd ed. 1923).

[27] M. Bacon Abridgement of the Law 5 (1854).

[28] 2 S. Stephen Stephen's Commentaries on the Laws of England 477 (E. Jenks 14th ed. 1903).

> The royal prerogative, 'in its nature singular and eccentrical', can be roughly described as those inherent legal attributes which are unique to the Crown. ... [P]rerogatives are non-statutory attributes of the Crown, not statutory attributes of its servants.[29]

The definition proposed by Professor Wade is even more exclusive:

> "Prerogative" power is, properly speaking, legal power which appertains to the Crown but not to its subjects. Blackstone explained the correct use of the term. ... Although the courts often use the term "prerogative" in this sense, they have fallen into the habit of describing as "prerogative" every power of the Crown which is not statutory. A true power, such as the power to declare war or to create a peer, involves something which no subject may do.[30]

Professor Phillips, on the other hand, has advised against a restrictive definition and stresses the common law nature of the prerogative: "The term 'royal prerogative' is not a technical one. It is ... preferably ... limited to those powers which the Sovereign has by the common law as distinct from statute."[31] This focus on the common law is also at the centre of the definitions suggested by William Anson and Peter Hogg. William Anson wrote: "[T]he term prerogative ... should properly be limited to the ancient customary powers of the Crown."[32] Professor Hogg, writing almost a century later, stated that:

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[29] S. de Smith Constitutional and Administrative Law 139 (5th ed. 1985).

[30] H. Wade Administrative Law 214 (5th ed. 1982).

[31] O. Phillips Constitutional and Administrative Law 262 (7th ed. 1987).

[32] W. Anson The Law and Custom of the Constitution, Part II, The Crown 2 (1896).

> The royal prerogative consists of the powers and privileges accorded by the common law to the Crown. Dicey described it as "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown". The prerogative is a branch of the common law, because it is the decisions of the courts which have determined its existence and extent.[33]

An equally important part of the definition of the prerogative is highlighted by McConnell in Commentary on the British North America Act: "When the prerogatives are exercised, the Crown ... is invoking the residue of its once very extensive personal powers."[34] The term "residue" is used because Parliament has taken away and qualified significant parts of the Crown's prerogative. Only Parliament may limit the prerogative and it is only the residue that may be exercised in the name of the Queen.[35]

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[33] P. Hogg Constitutional Law of Canada 10 (2d ed. 1985). See also Prerogative, Brook's New Cases 151, 152 (1651).

[34] W. McConnell Commentary on the British North America Act 31 (1977). See also The Queen v. Operation Dismantle, [1983] 1 F.C. at 779 ("the royal prerogative is what has been left to the King from the wide discretionary powers he enjoyed at the time he governed as an absolute monarch").

[35] Barnsley, 3 Atk. 168, 171 (1744) (prerogative of the Crown may only be altered by act of Parliament); Giles v. Grover, 9 Bing. 128, 277 (H.L. 1832) (express and unambiguous words required in order to take away the prerogative).

B. Origin of the Crown Prerogative

As the Crown prerogative is part of the common law, an understanding of the history of the prerogative will be necessary when considering the purpose or effect of any particular prerogative power. Evatt said that: "[O]ne consequence which follows from the fact that the Prerogatives of the King are part of the common law is that the history of the Prerogatives in general and of any particular power sought to be exercised may, and probably will, become of the utmost importance."[36]

When applying the Canadian Charter of Rights and Freedoms ("Charter") to a prerogative of the Crown, analysis of the history of the prerogative becomes of even greater importance. An understanding of the history of a prerogative is essential to the determination of the "purpose" of the prerogative, one of the questions which must be answered under Charter analysis.[37] Therefore, an inquiry into the origin of the prerogative and the prerogative of priority, in particular, will be conducted prior to subjecting the prerogative of priority to the rigours of section 15 of the Charter.

Before the emergence of parliamentary sovereignty, the Crown held an almost complete range of governmental powers by virtue of the royal prerogative.[38] Anson alluded to this pre-parliamentary origin when he described the prerogatives as: "the ancient customary powers of the Crown."[39] Halsbury's contains a similar statement: "[I]t is the residue of royal authority left over from a time before it was effectually controlled by law."[40]

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[36] H. Evatt The Royal Prerogative 14 (1981).

[37] The Queen v. Big M Drug Mart, [1985] 1 S.C.R. 295, 331-36. See discussion on pages 88-89, 132 & 136-39 below.

The various powers, privileges and pre-eminences which make up the prerogative can be divided into two groups arising out of three main sources during various periods of English history. Blackstone identified the two groups as the "direct" and the "incidental:"

> The *direct* are such positive and substantial parts of the royal character and authority, as are rooted in and spring from the king's political person, ... But such prerogatives as are *incidental* bear always a relation to something else, distinct from the king's person; and are indeed only exceptions, in favour of the crown, to those general rules established for the rest of the community.[41]

Professor Phillips referred to Blackstone's indirect prerogatives as the "personal" and Blackstone's direct prerogatives as the "political" prerogatives of the Crown: "It is still possible to distinguish between *personal* and *political* prerogatives, that is, between those which the Queen has as a person and those which she has as Head of State."[42] The personal prerogatives of the Queen grew out of the "personal relation of superiority and subjection" between Queen or King and subject which derived "from the pre-legal status of kingship."[43] The personal "sanctity" of the person of the Queen and the Queen's personal rights which flowed from that sanctity came from a "source and were distinct" from the rights of the Queen in her public capacity.[44] Because of the incidental prerogatives, the Queen was treated as an "abnormal person" in relation to the ordinary laws of the land.[45]

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[38] Report from the Senate Standing Committee on Constitutional and Legal Affairs 10 (Australia 1978) (hereinafter cited as "Australian Senate Report").

[39] W. Anson The Law and Custom of the Constitution, Part II, The Crown 2 (1896).

[40] 8 Halsbury's Laws of England 583 (4th ed. 1974).

[41] 1 W. Blackstone Commentaries on the Laws of England at 232-33 (1st ed. 1765).

Evatt adopted a general system of classification similar to Blackstone: "for practical purposes all the Prerogatives of the King can be divided into executive powers, certain immunities, and proprietary rights."[46] In his work A History of English Law, Holdsworth adopted Blackstone's classification of the prerogative into direct and incidental and then made the following observations with respect to the incidental prerogatives:

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[42] O. Phillips Constitutional and Administrative Law 266 (7th ed. 1987).

[43] F. Wormuth The Royal Prerogative 1603-1649 21 (1939).

[44] F. Wormuth The Royal Prerogative 1603-1649 52 (1939).

[45] Moore "Liability for Acts of Public Servants" 89 L.Q.R. 12, 14 (1907). See also 2 Bracton on the Laws and Customs of England 33 (S. Thorne trans., ed. 1968) (subjects cannot have equal status with the king since equal can have no authority over equal). For a review of other classification schemes see H. Evatt The Royal Prerogative 29-31 (1981).

[46] H. Evatt The Royal Prerogative 31 (1981).

> This miscellaneous collection of rights and privileges which make up the incidental prerogatives of the Crown, come, as I have already pointed out, from many different periods in English legal history, and are based on many different ideas. One set of these ideas can be traced to the feudal conception of the King as a lord of tenants; others can be traced to ideas derived from Roman law; others to deductions from the fact that the courts are the King's courts, and that lords who have courts have special privileges in their courts; others to the need for maintaining the King's dignity, and for securing his freedom of action; others to the idea that the King is the head and representative of the state. All these diverse ideas have, from an early date, become the starting-points for the continuous development of bodies of very technical rules, some of which are wholly or partially obsolete, while others have survived, and still function in an environment to which they are ill suited.[47]

The sources of the prerogative can be identified with three periods in English constitutional history: The Anglo-Saxon period prior to the Conquest; the medieval period after 1066; and, the Tudor-Stewart period in the sixteenth and seventeenth centuries.

During the early stages of English history the King was invested with power as chief executive officer of his people. He led them in war, administered their affairs in peace and was their judge in the last resort.[48] These powers are referred to as direct prerogatives.

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[47] 10 W. Holdsworth A History of English Law 357-58 (3rd ed. 1923). See also Bank of Nova Scotia v. Hart, [1981] 1 W.W.R. 552 (Alta. Master 1980) (extensive reference to Blackstone and Holdsworth on the subject of the direct and incidental prerogatives).

[48] W. Anson The Law and Custom of the Constitution, Part II, The Crown 3 (1896).

Most of the incidental prerogatives arose soon after William I won the throne of England in 1066. These trace their origin to the time when the King was "the feudal chief of the country, as the ultimate landowner and lord of every man."[49] "The two classes of prerogative (direct and incidental) have different roots ... arising from different theories of sovereignty and originating at different historical periods. The incidental prerogatives came into being in the medieval period."[50] Holdsworth confirmed this view:

> During the medieval period the king was regarded quite as much as a superior feudal lord with special privileges as a ruler entrusted with the executive powers of the state. It is for this reason that the doctrines as to those prerogatives which Blackstone calls "incidental" were then elaborated.
>
> ...
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> Already in [1548] feudal privileges of the crown were .... becoming merely the "incidental" prerogatives of the crown -- the ordinary private rights of the crown as contrasted with the sovereign position it held or claimed to hold in public law.[51]

Finally, there are attributes of the prerogative "with which the Crown has been invested by legal theory."[52] The royalist lawyers of the later half of the sixteenth and first half of the seventeenth century are largely responsible for the enhancement of Crown and prerogative under this theory to the point of "divine right."[53] The medieval theories of kingship began to assume a very practical importance with the revival of royal power in the sixteenth century. "Their consequences were developed, and they were given a sharper edge; for, under the influence of classical ideas they were put forth unencumbered by the medieval view that kingship involved duties as well as rights."[54] Professor de Smith accurately sets forth the state of the royal prerogative in the later part of the twentieth century: "the ... surviving prerogatives in domestic affairs are a mixed bag of residual loose ends; some linger on as reminders of feudal days, some are of major importance in the conduct of public affairs."[55]

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[49] W. Anson The Law and Custom of the Constitution, Part II, The Crown 4 (1896). See also J. Chitty Prerogatives of the Crown 211 (1820).

[50] Re Irish Employers Mutual Insurance Association, [1955] I.R. 176, 199 (S.C. 1953)(H.C. 1950).

[51] 3 W. Holdsworth A History of English Law 459-61 (3rd ed. 1923).

[52] W. Anson The Law and Custom of the Constitution, Part II, The Crown 4 (1896).

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[53] J. Allen Inquiry into the Rise and Growth of The Royal Prerogative in England 2 (1849) ("legal authority of the King of England is absolute and irresistible, ... he is the minister and substitute of the Deity; ... all are under him, while he is under none but God").

[54] 4 W. Holdsworth A History of English Law 192 (3rd ed. 1923).

[55] S. de Smith Constitutional and Administrative Law 145-46 (5th ed. 1985).

CHAPTER THREE

ORIGIN OF THE CROWN PRIORITY

A. Medieval Origins

Blackstone referred to the incidental prerogatives as "exceptions, in favour of the crown, to those general rules that are established for the rest of the community."[56] Holdsworth said that they were "the survivals of an obsolete form of political society."[57] One of the exceptions that has survived is the rule that Crown debts are to be paid in priority to other debts of equal degree.[58] To understand how this rule developed, reference may usefully be made to the medieval political system: "[T]he feudal rights of the Crown are mere incidents of the prerogatives; they add, here and there, features which can be only explained when we conceive of the king as being in relation to the kingdom what the lord was to the manor."[59] The feudal system is defined in Osborn's Concise Law Dictionary as follows:

> A state of society in which the main social bond is the relation between lord and man, a relation implying on the lord's part protection and defence; on the man's part protection, service, and reverence, the service

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[56] 1 W. Blackstone Commentaries on the Law of England 233 (1st ed. 1765).

[57] 3 W. Holdsworth A History of English Law 468-69 (3rd ed. 1923).

[58] 1 W. Blackstone Commentaries on the Law of England 233 (1st ed. 1765); 3 W. Holdsworth A History of English Law 459 (3rd ed. 1923).

[59] W. Anson The Law and Custom of the Constitution, Part II, The Crown 5 (1896).

> including service in arms. This personal relation is inseparably involved in a proprietary relation, the tenure of land. The man holds of the lord, the man's service is a burden on the land, the lord has important rights in the land (Maitland).
>
> The King was the ultimate lord of all land. He granted land to his lords in return for military and other services, and they in their turn made further similar grants, the process being known as subinfeudation. The unit of land in the system was the manor, each under its lord, who had a right to services in labour and in kind from the villeins, the servile tenants of the manor, over whom he exercised full jurisdiction. The lord in return owed them a duty of protection. The King had an overriding authority and claimed allegiance both from lords and their tenants.[60]

As Blackstone described the prerogative of priority as one of the "incidental" prerogatives, it is logical to commence an inquiry into the history of such prerogative with the feudal system, a system of property ownership in which feudal "incidents" played an important role.

At the heart of the feudal system was the homage done by a man to his lord. According to Glanvill a man could do several homages to different lords for the different fees held of those lords; but there had to be a chief homage, accompanied by an oath of allegiance. This chief homage was to be done to the lord of whom he held his chief tenement, commonly called his "liege lord."[61] Homage was to be done in the following form: "[H]e who is to do homage shall become the man of his lord, swearing to bear him faith of the tenement for which he does his homage, and to preserve his earthly honour in all things, saving the faith owed to the lord king and his heirs."[62] In Calvin's Case[63] Coke described in great detail the faith owed to the king:

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[60] J. Burke Osborn's Concise Law Dictionary 145-46 (6th ed. 1976).

[61] A treatise on the laws and customs of the realm of England commonly called Glanvill 104 (G.D.G. Hall trans., ed. 1965) (originally written c. 1187-1189).

> Ligeance is a true and faithful obedience of the subject due to his Sovereign. This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born he oweth by birth-right ligeance and obedience to his Sovereign. ... [L]igeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them."[64]

The "nature of the ceremony and the implications of homage" clearly denoted a personal relationship between Crown and subject.[65]

It is in this context that the priority of the Crown first arose. Although there is no definitive statement on the subject, Justice Kingsmill Moore of the Irish High Court concluded that the priority originated with the King's Exchequer to assist in the collection of his personal income:

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[62] A treatise on the laws and customs of the realm of England commonly called Glanvill 104 (G.D.G. Hall trans., ed. 1965). See also J. Allen Inquiry into the Rise and Growth of The Royal Prerogative in England 69-72 (1849).

[63] 7 Co. Rep. 1a (1609).

[64] 7 Co. Rep. at 4b & 5a.

[65] Morris "Introduction" in 1 The English Government at Work, 1327 -1336 at 8-9 (J. Willard and W. Morris 1940).

> It is somewhat more than a plausible conjecture that the king's prerogative of prior payment was introduced by his judges and officials as a useful piece of adjectival law to help a usually impoverished monarch in the collection of his personal income, and that, if any rashly curious person had questioned the legality of the privilege it would have been easy to cloak the high-handed element in such a procedure by reasoning which showed that it was inherent in the king's ownership of the machinery of justice and justifiable by his supereminent position as paramount overlord. The writ of Edw. 1, already quoted, did indeed claim the right as being ancient, customary and an appanage of the royal dignity, but the royal dignity of the thirteenth century was that of a mortal man and not that of an executive symbol.[66]

The common law courts later referred to this "justification" with the words *detur digniori* ("let it be given to the worthier").[67] Anne Hardy's conclusions in her book on the Crown priority are similar to those of Justice Kingsmill Moore:

> Included as part of the royal prerogative is the proposition that "[w]here the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being '*detur digniori*' " or "let it be given to the worthier." It is apparently from this general right that the rule has arisen that, in a competition between debts of equal degree owed to the government and to a subject, the claim of the Crown is entitled to preference. The Crown has traditionally been permitted to enforce this right by use of a prerogative remedy, the writ of extent.[68]

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[66] Re Irish Employers Mutual Insurance Association, [1955] I.R. at 204.

[67] Woodward v. Fox, 2 Ventris 267, 268 (1691); Re Irish Employers Mutual Insurance Association, [1955] I.R. at 207; 8 Halsbury's Laws of England 666-67 (4th ed. 1974); J. Chitty Prerogatives of the Crown 381 (1820) ("*Detur digniori* is the rule in the case of a concurrence of titles between the King and the subject").

[68] A. Hardy Crown Priority in Insolvency 2 (1986).

Legal theory in the twelfth and thirteenth centuries held that the Crown had no equal within his realm. According to Bracton on the Laws and Customs of England, a treatise originally prepared in the latter half of the thirteenth century, "Subjects cannot be the equals of the ruler, because he would thereby lose his rule, since equal can have no authority over equal."[69] Glanvill concurred. He wrote that: "[T]he lord king can have no equal, much less a superior."[70]

B. Role of the Exchequer in the Development of the Prerogative of Priority

1. Royal Income

Notwithstanding the reverence the law afforded to the monarch, the actual circumstances under which the King governed were not always so favourable. Under the medieval political system the King was expected "to live of his own." Sir Charles Ogilvie described conditions under which the King governed during the middle ages in this way:

> The King was expected "to live of his own", and to bear not only the expenses of his household, but the cost of carrying on the government of a national kingdom on a largely feudal income -- the rents of his estates

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[69] 2 Bracton on the Laws and Customs of England 33 (S. Thorne trans., ed. 1968).

[70] A treatise on the laws and customs of the realm of England commonly called Glanvill 84 (G.D.G. Hall trans., ed. 1965).

> and feudal dues, plus customs duties (which seem to have a purely prerogatival origin) and the largely usurped profits of justice. Down to the end of the period it was expected that normally there should be no taxation. Taxation meant to those interested -- the more or less well-to-do -- simply war taxation, and even in times of grave national emergency was granted grudgingly and insufficiently. "To the King belongs authority over all men, to the subject property." This dichotomy lies at the root of the difficulties and troubles which constantly beset the Crown, and of the hampering financial restrictions which were apt to stifle projects of reform or improvement as well as arbitrary and unpopular measures. The physical force at the disposal of the King was puny. He had no standing army, no police, no large paid bureaucracy, because he could not afford them."[71]

Because of the precarious state of the King's finances, the King was forced to fully exploit his judicial and feudal income in order to remain solvent. The King relied on the Exchequer to collect his feudal income.[72] William McKechnie described the manner in which the Exchequer exercised its authority during the reign of Henry I (1100 - 1135) as follows:

> [A]t the Exchequer, as organized by the King and his minister, the Sheriff of each county twice a year, at Easter and at Michaelmas, rendered account of every payment that had passed through his hands. His balance was adjusted before all the great officers of the King's household, who subjected his accounts to close scrutiny.[73]

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[71] C. Ogilvie The King's Government and the Common Law 1471 - 1641 at 3-4 (1958).

[72] Morris "Introduction" in 1 The English Government at Work, 1327 - 1336 at 5 (J. Willard and W. Morris 1940).

[73] W. McKechnie Magna Carta 9 (2nd ed. 1914).

During the eleventh and twelfth centuries William II and the Henry I increased the income of the Crown "by exploiting the judicial and feudal possibilities of the monarchy."[74] During the reign of Stephen (1135 - 1154) the Crown became impoverished due to "the breakdown of the whole royal administration and to the alienation of royal rights and revenues" as well as to the "decrease in the extent of the royal demesne."[75]

By the beginning of the reign of Henry II a considerable portion of William I's royal demesne had been alienated from the Crown. This "alienation altered the position of the king from landlord to overlord."[76] According to Professor Hoyt, the "constitutional significant of alienation of the royal demesne ... lies in the ... reason it provided for the development and exploitation of the feudal rights and profits of the monarchy. ... [T]he depletion of the royal demesne helped provide an incentive for royal policy."[77] The policy of Henry II was to re-establish the royal rights and revenues lost during the reign of Stephen:

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[74] R. Hoyt The Royal Demesne in English Constitutional History: 1066 - 1272 at 86 (1950).

[75] R. Hoyt The Royal Demesne in English Constitutional History: 1066 - 1272 at 87 (1950).

[76] R. Hoyt The Royal Demesne in English Constitutional History: 1066 - 1272 at 90 (1950).

[77] R. Hoyt The Royal Demesne in English Constitutional History: 1066 - 1272 at 90-91 (1950).

> The "state of confusion and disorganization" which characterized the Exchequer in the early years of Henry II's reign reflected the fact that "many years elapsed before the king succeeded in making his sheriffs render to him all that they ought to render." The king's ministers spent much time and effort in re-establishing royal rights and revenues ... .
>
> This work of ... recovering royal rights and revenues was carried on by the same royal officials who were responsible for the growth of the Angevin judicial and administrative system. From the barons in the Exchequer down to the hundred bailiffs, the king's ministers continued to represent him both as landlord of his demesne and as feudal king of the realm. ...[T]he growth of royal power came to depend more than ever upon the exploitation of ... feudal and royal rights ... .[78]

Henry II was largely successful in shoring up the royal treasury with new or improved feudal incidents, fines and other revenues. This fact is to a certain extent reflected in the inclusion of chapters 9 to 11 and 26 in Magna Carta. William McKechnie's commentary on Magna Carta described the circumstances affecting the King's barons at the time of Magna Carta:

> [W]ith feudal incidents and scutages, and indiscriminate fines, a large proportion of Englishman must have been permanently indebted to the Crown. At John's accession many northern barons still owed scutages imposed by Richard. John remitted none of the arrears, while imposing new burdens of his own: the attempts made to collect these debts intensified the friction between John and his barons.[79]

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[78] R. Hoyt The Royal Demesne in English Constitutional History: 1066 - 1272 at 91-92 (1950).

[79] W. McKechnie Magna Carta 222 (2nd ed. 1914).

In History and Antiquities of the Exchequer of the Kings of England, Thomas Madox confirmed that the "Exchequer was a Court greatly concerned in the Conservation of the Prerogatives as well as the Revenue of the Crown."[80] In Dialogus de Scaccario - The Course of the Exchequer, by Richard fitz Nigel, (originally completed approximately 1179) an early form of the priority is identified in instructions from the Exchequer to the Crown's sheriffs.[81] The sheriff was required to account for any insolvent debtors of the Crown by way of affidavit. The sheriff was warned not to "accept any sum lawfully due to himself from any debtor who has not paid the King. For it is improbable that the Sheriff should have failed to find chattels sufficient to pay the debt to the King in possession of a man who, willingly or not, has paid the Sheriff his personal demands."[82] The editor of the Dialogus advised by way of footnote to this passage that: "The king subsequently acquired priority over all creditors. See Madox, History of the Exchequer, chap. 23, s. 7 (p. 662 sq.)."[83] Based on this record of the development of the prerogative of priority, it is safe to conclude that the priority in favour of the Crown did not develop as an essential part of the executive function of the Crown but, rather, as an incidental or personal prerogative to aid in the collection of feudal incidents and other income of the Crown.

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[80] 2 T. Madox History and Antiquities of the Exchequer of the Kings of England 33 (2d ed. 1769).

[81] R. fitz Nigel Dialogus de Scaccario - The Course of the Exchequer 112-14 (C. Johnson trans., ed. 1983).

[82] R. fitz Nigel Dialogus de Scaccario - The Course of the Exchequer 114 (C. Johnson trans., ed. 1983).

[83] R. fitz Nigel Dialogus de Scaccario - The Course of the Exchequer 114 (C. Johnson trans., ed. 1983).

2. Role of the Sheriff

It appears that the sheriff in the twelfth century was trusted by neither King nor subject. Sheriffs were notorious for failing to account to the Exchequer for payments made by debtors of the Crown to discharge their debts. This caused problems for both King and debtor. "Sheriffs, after they had levied or received the Debts due to the King, often neglected or failed to answer the same at the Exchequer."[84] It is not surprising that the prerogative of priority should start with the sheriff. The sheriff was the central figure between King and subject in the remittance and collection of royal revenues. "The sheriff was normally responsible for the royal revenues within ~~his~~ shire."[85] Dialogus de Scaccario records ~~that~~ "It is the Sheriff, then, who must account for the public debts, since he alone has the power to distrain on individuals."[86] In order to protect the subject from abuse, "The Crown did sometimes, at the Complaint of the Parties grieved, issue Writs to enquire in the several

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[84] 2 T. Madox History and Antiquities of the Exchequer of the Kings of England 194 (2d ed. 1769).

[85] R. Hoyt The Royal Demesne in English Constitutional History: 1066 - 1272 at 11 (1950).

[86] R. fitz Nigel Dialogus de Scaccario - The Course of the Exchequer 105 (C. Johnson trans., ed. 1983).

Counties, what Persons had paid their Debts to Sheriffs, and what Sums, whereof the Sheriffs had not acquitted them at the Exchequer. And at length a Statute was made for Punishment of Sheriffs and others offending in such Cases."[87]

A practical example of the theory set forth in Dialogus de Seaccario can be found in the reported case of Stringefellow v. Brownesoppe.[88] In that case Stringefellow directed the sheriff to seize the lands and goods of Brownesoppe in order to satisfy a debt owing to Stringefellow. After the lands and goods were seized, "a writ of the king's prerogative issued out of the exchequer reciting the prerogative which the king ought to have to be first served and paid by his debtors, and commanded the sheriff to levy the debt to the king which the said Brownesoppe owed him."[89] The sheriff did not levy the debt to the Crown as demanded because the lands and goods had previously been seized on behalf of Stringefellow. The sheriff returned the writ of the Crown's prerogative "and averred in his return that the debtor had no goods or lands to be extended, besides the goods and chattels, lands and tenements above extended (for Stringefellow), and therefore as to the further execution of the writ he had done nothing. And it was holden in the exchequer for law, that the sheriff should be amerced if he would not amend his return, namely, return the extent into the exchequer for the service of the king's debt ... because the property of the goods and land was not in Stringefellow before they were delivered to him by the writ."[90] In other words, under the threat of being amerced (similar to being held in contempt of court) the sheriff was directed to satisfy the Crown's execution before Stringefellow's.

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[87] 2 T. Madox History and Antiquities of the Exchequer of the Kings of England 194-95 (2d ed. 1769).

[88] 1 Dyer 67 b (Ex. 1550).

[89] 1 Dyer at 67 b.

In order to protect the Crown from fraudulent sheriffs, an affidavit was required of the sheriff setting forth an account of insolvent debtors. The sheriff was given a period of grace before swearing the affidavit during which he could "recollect" that he had received a payment due to the Crown and come forward and apologize "for having forgotten." If the sheriff then paid in the sum received in the name of the debtor he would be acquitted of any wrongdoing. "But if (which Heaven forbid) after he has made his *affidavit* and the Exchequer has risen, the omission is revealed by somebody else, he will not get off by paying in what he has received, but will be adjudged at the King's pleasure for an amercement in money."[91] Because sheriffs often proved unreliable, Henry II eventually took steps to reduce dependence on the sheriffs for collection of royal revenues:

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[90] 1 Dyer at 67 b.

[91] R. fitz Nigel Dialogus de Scaccario - The Course of the Exchequer 114 (C. Johnson trans., ed. 1983).

> After the accession of Henry II, the Exchequer intervened much more effectively in the exploitation of the royal demesne in two ways. First, it established direct relations with the bailiffs and other subordinate officials immediately responsible to the sheriffs; and, second, it withdrew altogether the farm or custody of certain royal manors from the control of the sheriffs and their subordinates, placing them in the charge of persons who accounted for their issues directly to the Exchequer.
>
> ....
>
> From the reign of Henry II on, ... itinerant justices went behind the sheriff to investigate the conduct of bailiffs and also to inquire into the condition of royal manors.[92]

Professor Hoyt concluded his discussion of the decline of the power of the sheriff as follows:

> The growth of the English king's power involved a limitation of the sheriff's responsibility for revenue from the royal demesne, as well as for the administration of justice. ... [I]n England the development of the demesne was "intensive" rather than "extensive": it involved the increase of revenue through more efficient exploitation rather than an increase in geographical extent.[93]

3. Prerogative Protections

In Stringefellow there was no reference to a general priority of the kind described nearly three centuries later by the House of Lords in Giles v. Grover: "The general rule is, and this has been acknowledged in all cases, that when the right of the king and that of a subject concur, that of the king shall prevail."[94] The only prerogative referred to was "the prerogative which the king ought to have to be first served and paid by his debtors." Likewise, there was no reference to a general priority in Sir Edward Coke's Case,[95] 74 years after the decision in Stringefellow. The judges in Sir Edward Coke's Case identified four prerogatives relating to the recovery of debts and other duties owing to the Crown. Justice Dodderidge identified the four prerogatives as follows: first, the King "might have the lands, the goods, and the body of the person his debtor in execution for his debt;" second, the King was "to have his debt paid before the debt of any subject;" third, "the King shall have the debt of the debtor to the King's debtor paid unto him;" fourth, "the King shall have an accompt against executors" where it is found that "the testator was indebted to the King."[96] Justice Dodderidge associated the second prerogative, that requiring that the Crown's debt be paid before the debt of any subject, with the old common law right of the King to grant a protection to his debtor so that no other might sue the debtor before the King was satisfied his debt. According to Justice Dodderidge, the practice of granting protections came to be abused by those owing money to the Crown. Royal debtors delayed paying the Crown so as to frustrate their non-Crown creditors.

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[92] R. Hoyt The Royal Demesne in English Constitutional History: 1066 - 1272 at 94, 96 (1950).

[93] R. Hoyt The Royal Demesne in English Constitutional History: 1066 - 1272 at 107 (1950).

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[94] 9 Bing. at 183-84.

[95] Godbolt 289 (1624).

[96] Sir Edward Coke's Case, Godbolt at 290-91.

Because of this abuse, Edward III enacted a statute, 25 Edw. III, statute 5, c. 19, which modified the Crown's prerogative by providing that a "common person" may "lawfully sue to judgment", but may not "proceed to execution (and so the King's prerogative is saved) unless the plaintiffe who sueth will give security to pay first the King's debt."[97] Justice Dodderidge also noted that "by the statute of 33 H. 8. cap. 39. The execution of the subject shall be first served if his judgment be before any processe be awarded for the King's debt."[98] As a result of the statutory modifications of the Crown's prerogative by Edward III and Henry VIII, the practice of granting protections was ultimately abandoned.[99] Notwithstanding that protections fell "wholly into disuse," the prerogative itself remained available to the Crown. It was merely of no practical value to debtors of the Crown. In the 1832 edition of Coke's Commentary Upon Littleton the reader is advised in a footnote that "it is still usual in acts of parliament to guard against the use of protections in suits, to which persons acting under the authority of the legislature are parties."[100]

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[97] Sir Edward Coke's Case, Godbolt at 290.

[98] Sir Edward Coke's Case, Godbolt at 290.

[99] 1 E. Coke Commentary Upon Littleton 131 b (19th ed. 1832).

[100] 1 E. Coke Commentary Upon Littleton 131 b (19th ed. 1832).

As late as 1680 the prerogative power to grant protections to debtors of the Crown was still recognized by legal writers. Jura Coronae, published in 1680 by J. Brydall, included commentary upon 34 prerogatives of the Crown and listed, without commentary, 38 other prerogatives which were also "part of the Common-Law of *England*."[101] Included in this latter group were the following:

> 22. A Common Person shall not have Execution against the King's Debtor, until Agreement for the King's Debt.
>
> 28. When the Title of the King and a Subject concur, the King's Title shall be preferred.
>
> 29. The King may grant a Protection to protect his Debtor.
>
> 34. By Order of the Common Law, the King for his Debt had Exemption of the Body, Lands, and Goods of the Debtor.[102]

Sir Edward Coke explained the law of protections in his Commentary Upon Littleton. There were two forms of protection, one protecting all subjects of the Crown and the other protecting only specified subjects under specified conditions:

> It is to be understood, that there is a general protection of the king whereof *Littleton* here speaketh: and this extends generally to all the

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[101] J. Brydall Jura Coronae 128 (1680).

[102] J. Brydall Jura Coronae 130-31 (1680).

> king's loyall subjects, denizens and aliens within the realme, whose offences have not made them uncapable of it, as before it appeareth. And there is a particular protection by writ, which is one of the king's writs that *Littleton* here speaketh of. This particular protection is of two sorts; one, to give a man immunity or freedome from actions or suits; the second for the safetie of his person, servants and goods, lands and tenements, whereof he is lawfully posessed, from violence, unlawfull molestation or wrong. The first is of right and by law; the second are all of grace, (saving one) for the generall protection implyeth as much.[103]

Coke described four types of specific protections granted by the Crown. The third of these specific protections, Coke alleged, was given to the King to assist him in enforcing his prerogative "to be preferred in payment of his duty or debt by his debtor before any subject, although the king's debt or duty be the later."[104] Coke went on to record the evolution of the law relating to the exercise of the prerogative of granting protections to Crown debtors:

> [T]hereupon the law gave the king remedy by writ of protection to protect his debtor, that he should not be sued or attached untill he paid the king's debt. But hereof grow some inconvenience, for to delay other men of their suits, the king's debt were the more slowly paid. And for remedie thereof it is enacted by the statue of *25 E 3.* that the other creditors may have their actions against the king's debtor, and proceed to judgment, but not to execution, unlesse he will take upon him to pay the king's debt, and then he shall have execution against the king's debtor for both the two debts.[105]

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[103] 1 E. Coke Commentary Upon Littleton 131 a (19th ed. 1832).

[104] 1 E. Coke Commentary Upon Littleton 131 b (19th ed. 1832).

[105] 1 E. Coke Commentary Upon Littleton 131 b (19th ed. 1832).

The first two specific protections related to the staying of actions and suits in general.[106] These protections were purchased by subjects of the Crown and were often granted to subjects involved in some important public business, such as war or diplomacy.[107]

It is likely that the prerogative protections referred to above grew out of the practice of the King in the twelfth century of granting to some the privilege of only being impleaded or sued in the King's court. Madox wrote that:

> [I]t was not unfrequent for the King to grant to some Persons a Privilege, that they should not be impleaded in any other Court or Place, except before him or his chief Justicier. For example: K. *Henry* II. took the Monks of the *H. Trinity of Canterbury* into his Protection; and commanded that they should not be impleaded for any of their Lands except in his Presence.[108]

Henry II did much to consolidate justice in the royal courts. He accomplished this by extending the "king's peace" or protection to individuals who sought justice in his court:

> It was the Norman kings who used the idea of the king's peace as a means of extending their jurisdiction at the expense of local courts. For

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[106] 1 E. Coke Commentary Upon Littleton 131 b (19th ed. 1832).

[107] 1 E. Coke Commentary Upon Littleton 131 b (19th ed. 1832).

[108] 1 T. Madox History and Antiquities of the Exchequer of the Kings of England 116-17 (2d ed. 1769).

> financial and political reasons, they used their powers to exempt from the operation of the law and to extend the jurisdiction of their courts by granting new remedies where none had previously existed. In doing so, they exploited their position as fuedal suzerain as well as sovereigns with prerogative powers.[109]

Prior to the time of Henry II, justice, if one can use that term, was largely in the hands of local lords, with only the privileged having the opportunity to have their cases decided in the King's court. While justice was more likely in the King's court, it was not without a price. The King, as a "fountain of justice" did not fail to capitalize upon this natural resource. One did not get into the King's court without paying a fee. John Reeves described the practice at the time of William the Conqueror as follows: "The course of application to the *curia regis* was of this nature. The party suing paid, or undertook to pay, to the king a fine to have *justitiam et rectum* in his court."[110] Individuals in the eleventh and twelfth centuries were willing to pay for the privilege of access to the King's courts in order to obtain justice: "The King's courts became the supreme resort of justice simply because, in his hands, that commodity was more purely wrought and finely fashioned than elsewhere."[111] While the King's justice may have been more pure than that offered by his vassals it still contained a considerable amount of impurity. Reeves described the deplorable state of justice in the first two centuries after the Conquest in this way:

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[109] Feldman "The King's Peace, The Royal Prerogative and Public Order: The Roots and Early Development of Binding Over Powers" 47 Camb. L.J. 101, 107 (1988).

[110] 1 J. Reeves History of English Law From the Time of the Saxons to the End of the Reign of Phillip and Mary 49 (2nd ed. 1787).

[111] Laski "The Responsibility of the State in England" 147 L.T.J. 259 (1919).

> It was during this precarious state of our laws, that the people were constrained to purchase the favour of the crown, in order to obtain justice in the king's courts. Fines were paid for the express purpose of having justice and right. Presents of a considerable value were made by suitors to obtain the opinion of the king's justices in a cause depending; for writs, pleas, trials, judgments. Sometimes part of the debt in contest was proffered to the crown for a favourable decision. Thus was the common course of justice made liable to the interference and control of royal authority.[112]

In the twelfth century document Dialogus de Scaccario the author defended the apparent injustice of a system which required the subject to present gifts to the King in order to obtain justice in his courts:

> But offerings are said to be made *in spem*, or for future advantage, when a man offers a sum to the King to obtain justice about some farm or rent; not, of course, to ensure justice being done - so you must not lose your temper with us and say the King sells justice -- but to have it done without delay.[113]

One is reminded of the maxim "justice delayed is justice denied."

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[112] 1 J. Reeves History of English Law From the Time of the Saxons to the End of the Reign of Phillip and Mary 205-06. (2nd ed. 1787).

[113] R. fitz Nigel Dialogus de Scaccario - The Course of the Exchequer 120 (C. Johnson trans., ed. 1983).

The royal practice of dispensing justice for a price benefitted both monarch and subject. Because the quality of justice in the courts of the King was usually much higher than that in the courts of lesser lords, subjects were willing to pay more to obtain justice in the royal courts. The Crown benefitted from such an arrangement in two ways. First, the royal revenues were supplemented by the "fines" paid for justice. Second, the power of the Crown was enhanced by the increase in jurisdiction of the royal courts of justice. Because of the flexibility of the prerogative, both Crown and subject benefitted from the invocation of the prerogative in many areas of the law. The law of debtor and creditor was no exception. Prerogative protections were purchased by debtors of the Crown to delay the ability of other creditors to collect their debts.[114] The protections, of course, benefited the Crown by preserving the opportunity to extract payment from the subject prior to payment by the subject of any other debts. Protections also benefited the subject by providing a form of bankruptcy protection, allowing the subject to continue carrying on business without harassment from other creditors.

The extraordinary remedies available to the Crown in the Exchequer also became available to the subject. While the power of the Exchequer was, theoretically, exclusively for the use of the Crown, subjects could, for a price, avail themselves of the Exchequer's extraordinary remedies. According to

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[114] Giles v. Grover, 9 Bing. at 233, 276.

McKechnie, the fiction of "Crown debtors" was developed whereby plaintiffs obtained a hearing in the Exchequer for their common pleas by alleging that they wished to recover debts due to them "in order to enable them to answer the debts they owed to the king."[115] This abuse of the Exchequer benefitted both the King and common creditors:

> Now, the Exchequer, when it sat as a Court of law, was ever willing -- for a consideration -- to place its potent procedure, devised for the King's use, at the disposal of private creditors, treating "common pleas" as "exchequer pleas." Ordinary debtors, summoned to answer for their debts before the *barones scaccarii* were subjected to more rapid pressure than they would have experienced elsewhere. Debtors were thus as anxious to escape the jurisdiction of the Exchequer, as creditors were to invite it.[116]

In his discussion of "Extents in Aid", Edward West noted that: "As far back as our legal annals extend, we find a constant endeavor on the part of the subject to avail himself of the Crown-process for the recovery of private debts."[117]

The use of the prerogative for private gain by the subject was not restricted to the purchase of protections or justice from the Crown and was not restricted to the twelfth and thirteenth centuries. It appears that in the late sixteenth and early seventeenth centuries the royal prerogative was relied on extensively by subjects to accomplish their own private ends.[118]

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[115] W. McKechnie Magna Carta 269 (2nd ed. 1914).

[116] W. McKechnie Magna Carta 268 (2nd ed. 1914).

[117] E. West Extents 251, and see 252-64 (1817).

The fact that subjects of the Crown benefitted along with the Crown from the exercise of the prerogative explains to some extent the apparent popularity of the prerogative in some circles as late as the seventeenth, eighteenth and nineteenth centuries. However, credit for the development of the vast and significant prerogative powers attributed to the Crown must go to the royal courts.[119] It is not surprising that courts created by the King for the purpose of protecting the King's revenue should so favour the King. It may be unfair to observe that the King's judges depended upon the King for their remuneration and that, therefore, if the King's revenue suffered, they stood to suffer. On a slightly higher level, there is no doubt that as royal appointees, the King expected and they were willing to give their assistance in the protection of the rights of the Crown.[120] The House of Lords recognized this "duty" in Giles v. Grover:[121] "Your Lordships will know that the Barons of the Court of Exchequer are very peculiarly conversant with the revenue of the crown. It is their peculiar duty to attend to and enforce the rights of the crown against the subject, as connected with that revenue." Justice Dodderidge in Sir Edward Coke's Case made a similar observation: "I observe, that from age to age what care the Judges had for the advancing and the recovering of the King's debts."[122] Chief Baron Tanfield agreed with Justice Dodderidge. He expressed the opinion "that all powerful and speedy courses are given unto the King for the getting in of his revenues ... . The course of the Exchequer makes a law every where for the King."[123] In that same case Lord Chief Justice Hobart said that "the law amplifies every thing which is for the Kings benefit, or made for the King."[124]

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[118] See Morgan "Whose Prerogative in Late sixteenth and Early seventeenth Century England?" 5-6 J. of Legal Hist. 39 (1984-85) (prerogative available as a flexible and accessible means of meeting private ends).

[119] See Feldman "The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding Over Powers" 47 Camb. L.J. 101, 107 (1988).

[120] 10 W. Holdsworth A History of English Law 346, 358 (3rd ed. 1923).

[121] 9 Bing. at 279-80.

C. The Development of Royal Priority in France

It is useful to compare and contrast the development of the priority in favour of the Crown in England with the development of the priority in favour of the king in France. It appears that originally the priority in favour of the English Crown only applied to the sheriff, the officer of the Crown in charge of collecting the Crown's revenues.[125] Subsequently, of course, the Crown acquired priority over all creditors through the good will of the barons of the Exchequer. French civil law originally gave to the king of France a priority in respect of only those debts due from "comptables."[126] The word "comptables" is a "technical term of French law denoting officers who receive and are accountable for the King's revenues."[127] French comptables were the equivalent of the English sheriffs who collected royal revenues. Unlike the history of the prerogative of priority in England, the priority of the French king for debts due from his comptables was not extended to other crown debtors. Even during the reign of Louis XIV, the priority was restricted to comptables alone.[128]

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[122] Godbolt at 293.

[123] Godbolt at 294.

[124] Godbolt at 295. See also 10 W. Holdsworth A History of English Law 356 (3rd ed. 1923) ("The superior dignity of the King, and his special relations to the law and to his judges, have always induced the courts to give special advantages to the King, when his interest and that of a subject conflict.").

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[125] R. fitz Nigel Dialogus de Scaccario - The Course of the Exchequer 114 (C. Johnson trans., ed. 1983). See also pages 33-34 above.

[126] Exchange Bank of Canada v. The Queen, 11 App. Cas. 157, 164 (P.C. 1886) (Que).

[127] 11 App. Cas. at 165.

[128] 11 App. Cas. at 164-65.

D. Judicial Treatise on the Origin and Nature of the Crown Priority[129]

The most thorough and complete judicial discussion of the history of the prerogative of prior payment was conducted by Justice Kingsmill Moore in Re Irish Employers Mutual Insurance Association.[130] In that case Justice Kingsmill Moore reviewed the development of the prerogative of prior payment from the earliest period of legal history to the twentieth century and accepted the proposition that:

> The Common law prerogative of prior payment of his debts belonged to the king, not because he was the supreme executive authority, but because of the personal pre-eminence over all subjects which attached to him at common law, on the principle expressed in the phrase "*detur digniori*".[131]

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[129] Re Irish Employers Mutual Insurance Association [1955] I.R. at 198 (Because the subject had not been fully dealt with in any text-book Justice Kingsmill Moore chose to summarize his investigations into history and constitutional law and practice respecting the Crown priority, investigations "which lead into regions not often explored by modern practicing lawyers.")

[130] [1955] I.R. 176; and see 8 Halsbury's Laws of England 667 (4th ed. 1974). See also R. Charney "Crown Prerogatives: Where Are They Now" prepared for the Law Reform Commission of Canada (Aug. 1983) (available in Law Reform Commission of Canada Library) ("There has been no comprehensive examination of the Crown prerogative since Chitty wrote his treatise over 160 years ago."). Other than the reference in Halsbury's Laws of England, Justice Kingsmill Moore's decision has been undisturbed by legal commentators or judges for over 35 years.

[131] Re Irish Employers Mutual Insurance Association, [1955] I.R. at 199. See also Ehrlich "Proceedings Against the Crown (1216-1377)" in Oxford Studies in Social and Legal History 11-12 (1974) (legal justification lies in the character of King as sovereign).

Based on his study of British constitutional history, Justice Kingsmill Moore came to the following conclusions regarding the origin and nature of the prerogative:

> 1. The prerogative originated in a period when modern conceptions of the nature of sovereignty and government had not yet arisen: The structure of society was still feudal; property law was built on a feudal skeleton; loyalty was an essentially personal matter; the king was looked on more as a feudal overlord than as the embodiment of national power and aspiration; and the royal revenues, feudal by nature, were regarded as the king's personal possession, which could be spent by him according to his personal desires and without restriction by ministerial or parliamentary interference.
>
> 2. When it was sought eventually to find a legal principle on which to base this prerogative the principle was derived from cases which were concerned with feudal incidents and the feudal law of property.
>
> 3. ... The prerogative was an appanage of property and of the royal nature, not of executive power.[132]

Justice Kingsmill Moore's reasons for judgment are set forth in Appendix I. His treatise on the nature and origin of the Crown prerogative of priority can be found on pages 199 through 212 of the reported decision.

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[132] [1955] I.R. at 215.

CHAPTER FOUR

MODIFICATION OF THE CROWN'S PREROGATIVE PRIORITY

A. Magna Carta

The first "legislative" modification of the prerogative of priority was contained in Magna Carta. In The King v. Curtis[133] it was suggested that Magna Carta was only declaratory of the common law:

> By the common law the King has a prerogative of preference in payment to all of his subject, and to be first satisfied; ...
>
> This preference which the King had by the common law, was the foundation of Magna Charta, c. 18, which was only declaratory of the common law.[134]

However, considering the circumstances under which Magna Carta was prepared, it is probable that in restating what was recognized by the common law it was intended that the Crown's agents would be limited in their actions and prevented from expanding or abusing royal powers.[135]

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[133] Parker 95 (1750).

[134] Parker at 99. See also Bankruptcy and Insolvency, Report of the Study Committee on Bankruptcy and Insolvency Legislation, (Canada 1970) at 122 (hereinafter cited as "Canadian Study Committee Report (1970)").

[135] W. McKechnie Magna Carta 321-26 (2nd ed. 1914).

To describe Magna Carta as merely declaratory of the common law ignores the circumstances under which it was accepted by King John. Magna Carta was a product of intense negotiation among the interested parties at the time and was essentially repudiated by King John shortly after his acceptance of the charter at Runnymede.[136] There is one sense in which it can be said that Magna Carta is declaratory of the common law. If one defines the common law as that which was accepted as law by the King and barons in 1215 then Magna Carta, quite logically, can be described as merely declaratory of the common law. However, even in declaring what the law is, it is nearly impossible to avoid changing custom or practice. McKechnie refers to this in the context of Magna Carta:

> Blackstone, writing in 1759, expresses the generally accepted views: "It is agreed by all our historians that the Great Charter of King John was for the most part compiled from the ancient customs of the realm, or the laws of King Edward the Confessor, by which they usually mean the common law, which was established under our Saxon princes, before the rigours of feudal tenures and other hardships were imported from the continent." Substantially the same doctrine has been enunciated only the other day, by our highest authority. "On the whole, the charter contains little that is absolutely new. It is restorative. John in these last years has been breaking the law; therefore the law must be defined and set in writing." This view seems, on the whole, a correct one: the insurgents in 1215 professed to be demanding nothing new. Yet the Great Charter contained much that was unknown to the days of the Confessor and had no place in the promises of Henry I.
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> Thus it is not sufficient to describe Magna Carta merely as a declaratory enactment ... .

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[136] W. McKechnie Magna Carta 36-47 (2nd ed. 1914).

> History, indeed, has proved that a purely declaratory enactment is impossible: the mere lapse of time, by producing an altered context, changes the purport of any statute re-enacted in a later age. It is no unusual device for innovators to render their reforms more palatable by presenting them disguised as returns to the past. ... Thus, some of the provisions of the Great Charter which, at a casual glance, appear declaratory, are, in reality, innovations; while others tend towards reaction.[137]

The House of Lords has not attributed to Magna Carta a mere declaratory role. In Giles v. Grover[138] Magna Carta was said to have "controlled and regulated" some of the prerogatives which gave the Crown priority.

In The Second Part of the Institutes of the Laws of England Sir Edward Coke provided a line by line commentary on Magna Carta.[139] In his commentary, Coke expressed the view that in certain places Magna Carta modified the prerogatives allowed to the Crown under the common law. In chapter 8 of Magna Carta the King promised that "We, or our bailiffs, shall not seize any land or rents for any debt, as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefore."[140] In the absence of this declaration the Crown was allowed by the common law to seize the lands of a debtor without first executing against the debtor's goods. Coke's commentary on this promise reads: "By order of the common law, the king for his debt had execution of the body, lands, and goods of the debtor: this is an act of grace, and restrainth the power that the king before had."[141] It must be acknowledged, however, that while Magna Carta did make some minor changes to the Crown's prerogative of priority, the greater part of Magna Carta merely confirmed the common law as it stood in the thirteenth century.[142]

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[137] W. McKechnie Magna Carta 111-13 (2nd ed. 1914).

[138] 9 Bing. at 184.

[139] E. Coke The Second Part of the Institutes of the Laws of England (1817).

[140] Magna Carta, 1297, 25 Edward I.

B. The Prerogatives of the Crown May Only be Modified by Parliament

One of the leading cases in English constitutional law is the Case of Proclamations.[143] In that case the court held that "the King hath no prerogative, but that which the law of the land allows him."[144] The law of England was said to be divided into three parts: "common law, statute law and custom; but the King's proclamation is none of them." The Crown has no right by virtue of the prerogative to change the law by proclamation. Neither does the Crown have the right to add to the prerogative. In British Broadcasting Corporation v. Johns[145] the English Court of Appeal declared that:

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[141] E. Coke The Second Part of the Institutes of the Laws of England 18 (1817).

[142] E. Coke The Second Part of the Institutes of the Laws of England 32 (1817).

[143] 12 Co. Rep. 74 (1611). See S. de Smith Constitutional and Administrative Law 81 (5th ed. 1985).

[144] Case of Proclamations, 12 Co. Rep. at 76.

> [I]t is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints upon citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension.

For at least the last four centuries, the Crown prerogative has been subject to modification only by Parliament or, in the case of Canada, Parliament and provincial legislatures.[146]

While Parliament may amend or abolish the prerogative of the Crown, explicit language is required to do so:

> In Bacon's Abr. it is said
>
> > Where a statute is general and thereby any prerogative, right, title or interest is divested or taken from the King, in such case the King shall not be bound unless the statute is made by express words to extend to him.[147]

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[145] [1965] 1 Ch. 32, 79 (C.A. 1964).

[146] A. Dicey Law of the Constitution 64 (9th ed. 1939) (any prerogative power or any other branch of royal authority may be regulated or abolished by act of Parliament).

[147] Maritime Bank v. The Queen, 17 S.C.R. 657, 660-61 (1889). See also Alberta Government Telephones v. Canadian Radio-Television Commission, [1989] 2 S.C.R. 225, 281 (Interpretation Act has supplanted common law rule that Crown not bound unless expressly referred to or by necessary implication).

There have been two major statutory modifications of the prerogative of priority in England since Magna Carta. The first was in 1350 - 1351 and the second in 1541 - 1542. It is submitted that in Canada a third important amendment took effect in 1985.

C. 25 Edward III, statute 5, c. 19

The prerogative of priority was modified by chapter 19 of statute 5 of Edward III in the 25th year of his reign, 1350 - 1351. That chapter reads as follows:

> Item, Forasmuch as our lord the King hath made before this time, protections to divers people, which were bounden to him in some manner of debt, that they should not be impleaded of the debts which they owed to others, till they had made gree to our lord the King of that which to him was due by them, by reason of his prerogative; and so during such protections no man hath used, nor durst implead such debtors; (2) it is accorded and assented, That notwithstanding such protections, the parties which have actions against their debtors, shall be answered in the King's court by their debtors; (3) and, if judgement be thereupon given for the plaintiff or demandant, the execution of the same judgement shall be put in suspense till gree be made to the King of his debt. (4) And if the creditors will undertake for the King's debt, they shall be thereunto received, and shall have execution against the debtors of the debt due and adjudged to them, and also shall recover against them as much as they shall pay to the King for them.

Originally the Crown had some very extraordinary and very effective prerogatives for the recovery of debts. The King had the prerogative power of granting protections to debtors so as to prevent lawsuits against them. This had the effect of preserving the debtor's assets for the King's execution. At the common law a "common person" did not have the power to execute against the body or lands of his or her debtors.[148] The King, on the other hand, had the prerogative power to "have the lands, the goods, and the body of the person of his debtor in execution for his debt."[149] Through the use of these two prerogative powers of protection and execution the Crown could, in effect, ensure that debts owed to the Crown were paid in priority to debts owed to a subject of the Crown. Thus, regardless of whether the common law accorded him a general priority, he was able to affect the same result by granting prerogative protections. This leads one to speculate as to which came first, the prerogative right or the prerogative remedy? Did the common law allow the Crown extraordinary prerogatives to grant protections and to execute against the lands, chattels and body of the debtor because of a prerogative right to be paid first or did the common law develop the principle of a prerogative right to be paid first as an explanation for the effect of the exercise by the Crown of the prerogative power to grant protections and to execute against the person and property of the subject? Common sense and logic would favor the latter conclusion.[150]

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[148] Sir Edward Coke's Case, Godbolt at 290.

[149] Sir Edward Coke's Case, Godbolt at 290.

[150] See the discussion of prerogative right and prerogative remedy under the heading "One Prerogative or Two?" on pages 75-78 below.

The statute of 25 Edward III, statute 5, c. 19 was intended to modify the Crown prerogative so as to remedy an abuse of the prerogative by certain subjects of the Crown. Lord Coke described the problem which had developed in this way: "[T]he law gave the king remedy by writ of protection to protect his debtor, that he should not be sued or attached untill he paid the king's debt. But hereof grew some inconvenience, for to delay other men of their suits, the king's debts were the more slowly paid."[151]

Lord Tenterden C.J. described the reforming effect of 25 Edward III, statute 5, c. 19 in Giles v. Grover:[152]

> This statute, therefore, so far altered the law as that it enables the subject to bring an action against his debtor, although he be a debtor to the crown; which before he could not do; but nevertheless it prevents him from taking out execution unless he first satisfies the debt of the crown.
>
> This was the state of the law before the passing of the statute to which I have referred; namely, the statute of 33 Hen. 8. The subject might commence an action, and might have proceeded even to judgment, but could have no execution without satisfying the king's debt.

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[151] 1 E. Coke Commentary Upon Littleton 131 b (19th ed. 1832).

[152] 9 Bing. at 283.

D. 33 Henry VIII, c. 39, s. 74[153]

The second parliamentary modification to the prerogative of priority was enacted in 1541 - 1542, the 33rd year of the reign of Henry VIII. That modification is found in 33 Henry VIII, c. 39, s. 74:

> And be it also enacted by the authority aforesaid, That if any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons: (2) and that our said sovereign lord, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons, so always that the King's said suit be taken and commenced, or process awarded for the said debt at the suit of our said sovereign lord the King, his heirs or successors, before judgement given for the said other person or persons.

The Statute of 25 Edward III, statute 5, c. 19 had not completely solved the problem for the unfortunate creditor of a debtor of the Crown. That statute had only alleviated in part the detrimental impact of writs of protection. As the writs were for unlimited periods of time, the Crown could still postpone execution of the debtor for an indefinite time by simply delaying to take out execution in the Crown's own suit. By the statute of 33 Henry VIII, c. 39, s. 74, the power of the Crown to postpone the execution of the subject's judgment for an unlimited time was taken away except where the suit of the Crown was commenced before judgment had been obtained by the subject. In that case, the effect of the old prerogative remained.[154] Baron Bayley described the effect of 33 Henry VIII, c. 39, s. 74 in this way:

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[153] Halsbury's Statutes of England (1929) cites this section as 33 Henry VIII, c. 39, s. 51.

> The provision then in 33 Hen. 8, c. 39, s. 74 seems to me merely to narrow the prerogative, that whereas before, the creditor might be restrained from suing out execution till the king's debt was agreed for, whether the king was suing for his debt or not, that from henceforth the right of restraining the creditor from suing out execution should be confined to those cases in which the king was suing or had process awarded for his debt, but that that right should nevertheless continue if the king was suing or had process awarded.[155]

Thus, after the enactment of Henry VIII, c. 39, s. 74, where the Crown commenced its suit prior to judgment in favour of the subject creditor the debt due to the Crown had to be satisfied before the subject could execute a writ. However, where the Crown had not commenced its suit or awarded its process before the subject's judgment was signed the field was open both to the Crown and the subject, and if the subject could complete execution before the Crown issued its writ, the subject would enjoy the fruit of the execution.[156]

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[154] Giles v. Grover 9 Bing. at 276-77.

[155] Giles v. Grover 9 Bing. at 260-61.

[156] Today the Execution Creditors Act, R.S.A. 1980, c. E-14, s. 12 requires distribution of funds held by the sheriff ratably among execution creditors.

E. Section 15 of the Charter

1. Reception of English Law

a. Common Law Provinces

The law of England, including the common law rules relating to the Crown's prerogative and the statute law modifying such rules,[157] was received into the common law provinces of Canada as of various dates over the last two centuries. The "in force" dates of the reception of English law vary from October 3, 1758 for Nova Scotia and New Brunswick to July 15, 1870 for Manitoba, Saskatchewan and Alberta.[158] The date for the reception of English law into the three prairie provinces was fixed by statute. However, the date for the reception of English law into the maritime provinces of Nova Scotia and New Brunswick was fixed by the common law applicable to the establishment of English colonies.[159] In a settled colony the common law considers that the first colonists on arrival bring with them such of the laws of England as are reasonably applicable to the circumstances of the new colony.[160]

For the purpose of analyzing the prerogative of priority, the exact date of reception of English law into the common law provinces is not important.

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[157] Cote "The Introduction of English Law into Alberta" 3 Alta. L. Rev. 262, 272 (1964).

[158] B. Laskin The British Tradition in Canadian Law 3-10 (1969). See also Cote "The Introduction of English Law into Alberta" 3 Alta. L. Rev. 262 (1964).

[159] Cote "The Introduction of English Law into Alberta" 3 Alta. L. Rev. 262 (1964).

[160] Cote "The Introduction of English Law into Alberta" 3 Alta. L. Rev. 262 (1964).

What is important is that English common law has been received and is applied in Canada. The Supreme Court of Canada left no doubt in The Queen v. Bank of Nova Scotia that "the Queen's prerogative [preference], in ... Canada, is as exclusive as it is in England, the Queen's rights and prerogatives extending to the colonies in like manner as they do to the mother country."[161]

b. Quebec

Quebec received two sets of laws in 1774 when the Quebec Act affirmed the nature of the law which would be in force in that province:

> The *Quebec Act* of 1774 sealed the fate of the two major legal systems that would govern the law applicable in Quebec: French civil law as it stood before 1760 with its subsequent amendments in Quebec for everything relating to property and civil rights, and the common law as it stood in England at that time, and as subsequently amended, for what related to public law.[162]

The effect of the Quebec Act of 1774 read together with section 129 of the Constitution Act, 1867 is to exclude the prerogative of priority from having effect in the province of Quebec.[163] The Civil Code "exhaustively" deals with the subject of priorities and is binding upon both the provincial and federal

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[161] 11 S.C.R. at 10.

[162] Laurentide Motels v. Beauport, [1989] 1 S.C.R. 705, 737. See also B. Laskin The British Tradition in Canadian Law 3-5 (1969).

[163] See L. Duncan and J. Honsberger Bankruptcy in Canada 658-59 (1961)("under Quebec civil law there is not the [common law] privilege in the Crown for preferential payment.").

Crown.[164] There is no room for the common law prerogative of priority under the Civil Code, the system of law governing property and civil rights in Quebec.[165]

2. Equality Restored

On April 17, 1985 section 15 of the Charter came into effect. By virtue of section 52 of the Constitution Act, 1982 section 15 is part of the supreme law of Canada and by virtue of section 32(1) binds the Crown. Section 32(1)(a) provides that the "Charter applies to the Parliament and government of Canada in respect of all matters within the authority of Parliament." Section 32(1)(b) similarly subjects the provincial Crown to the Charter. Section 9 of the Constitution Act, 1867 vests the "executive government and authority of and over Canada ... in the Queen." Thus, the Crown and her royal prerogative are expressly made subject to the Charter. This is confirmed by the Supreme Court of Canada in Operation Dismantle v. The Queen.[166] By virtue of section 52(1) of the Constitution Act, 1982, any part of the royal prerogative that is inconsistent with section 15 of the Charter is, to the extent of such inconsistency, of no force or effect.

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[164] Exchange Bank of Canada v. The Queen, 11 App. Cas. 157, 164-66 (P.C.)(1886).

[165] The fact that the Crown prerogative of priority does not exist in Quebec may raise questions of geographic discrimination under section 15 of the Charter. See, however, The Queen v. Turpin, [1989] 1 S.C.R. 1296 (geographic discrimination in Criminal Code not violative of section 15 based on facts in case).

[166] [1985] 1 S.C.R. 441, 463-64.

The concept of equality celebrated in section 15 of the Charter is central to the democracy under which Canada is governed. Section 15 is appropriately set in the middle of the Charter as all rights and freedoms set forth in the Charter are based, to a greater or lesser extent, on the central theme of equality. Because all are equal all deserve equal respect. This theme is fundamental to the protection of freedom of conscience and religion set forth in 2(a) of the Charter. Section 3 also illustrates this principle of equality; each citizen has the right to vote and the right to run for public office. Similar comments could be made with respect to each of the other sections of the Charter. In Andrews v. The Law Society of British Columbia,[167] at the Court of Appeal level, Justice McLachlin recognized the centrality of the principle of equality to the rights and freedoms set forth in the Charter when she acknowledged the fact that a claim under section 15 of the Charter could be advanced along with a claim under just about any other section of the Charter.

Is the prerogative of priority consistent with the concept of equality set forth in section 15 of the Charter? Can a prerogative based upon a political system which perpetuated the principle that individuals are not equal survive in a political system premised on the understanding that all individuals are entitled to equal dignity, respect and justice? These questions will be answered in chapters six and seven.

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[167] [1986] 4 W.W.R. 242, 250 (B.C.C.A.), aff'd [1989] 1 S.C.R. 143.

F. Prerogative Modified, not Replaced

Notwithstanding the statutory modifications to the prerogative of priority, it must still be classified as a part of the common law. The statutes of Edward III and Henry VIII modified but did not replace the prerogative. As noted by the House of Lords in Giles v. Grover,[168] "The rule of law has always been, that the prerogative of the crown cannot be taken away, except by express and unambiguous words." The old prerogative still remains, subject to the limitations set forth in 25 Edward III, statute 5, c. 19 and 33 Henry VIII, c. 39, s. 74.[169] In his book Prerogatives of the Crown, Chitty confirmed that the statutes of Edward III and Henry VIII did not abrogate or replace the common law prerogative priority of the Crown: "[T]he Crown is entitled at common law to a preference, till the subject's execution is *complete* ... . The general common law doctrine [is] that the prerogative must prevail where it stands in competition with a subject's rights, arising concurrently with those of the

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[168] 9 Bing. at 277.

[169] Giles v. Grover, 9 Bing. at 276-77 & 282-85; Clarkson v. Canada, 16 O.A.R. 202, 209 (C.A. 1889).

Crown, and that consequently the prior part of the 74th section [of 33 Henry VIII, c. 39] is merely declaratory of the old common law."[170]

G. Modern Applications of the Prerogative of Priority

1. Exclusion of Commercial Debts

a. House of Lords

Prior to the twentieth century, no one questioned the application of the Crown prerogative of prior payment of debts. In 1907 Lord MacNaghten understood the law to be as follows:

> In *Rex v. Wells*, in a passage which has been often cited, MacDonald C.B. says: "I take it to be an incontrovertible rule of law that where the King's and the subject's title concur the King's shall be preferred." Except so far as the legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community. The rule is enunciated by Lord Coke in *Quick's Case*. From Lord Coke's time to the present day it has never been questioned as a rule of law, and, so far as their Lordships are aware, there has never been any attempt on the part of any Court to limit the generality of its application except in the present case, and in two recent cases in the Colonies which will be referred to presently.[171]

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[170] J. Chitty Prerogatives of the Crown 290 (1820). See also F. Maitland The Constitutional History of England 418-19 (1913) ("without directly destroying ... prerogative powers statutes have created a large number of powers dealing with the same matters").

[171] Commissioners of Taxation for New South Wales v. Palmer, [1907] A.C. 179, 182 (P.C.) (N.S.W.).

In Food Controller v. Cork[172] the House of Lords took issue with this broad statement of the law by Lord MacNaghten. The law lords expressed much doubt and reservation about the application or extension of the prerogative priority "to cases of ordinary commercial or industrial contracts entered into by a Government department in the course of the business or enterprise which it carries on."[173] In Food Controller v. Cork a government department, the Food Controller, contracted with a business to sell and distribute frozen rabbits which were imported by the government into England. The business sold and delivered to various retail customers the frozen rabbits received from the Food Controller and was paid the purchase monies for such rabbits. However, the business did not pay the Food Controller the whole of the sums due to the Food Controller under the agreement between the business and the Food Controller. A question arose as to the ability of the Food Controller to assert the royal prerogative to establish preference in the payment of the debts of the frozen rabbit distribution business. The House of Lords ruled that section 209 of the Companies (Consolidation) Act, 1908 had the effect of destroying the prerogative priority in that case by replacing it with a statutory scheme of priority which could not exist concurrent with the Crown priority which existed at common law. Lord Wrenbury described the effect of section 209 in this way:

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[172] [1923] A.C. 647 (H.L.).

[173] [1923] A.C. at 666.

> By s. 209, sub-s. 1(a), certain Crown debts, which I will call specified Crown debts, are brought into the class of debts identified by s. 209, sub-s. 1(a), (b), (c), (d). Debts of this class are to be paid "in priority to all other debts," in priority, therefore, to (amongst others) the unspecified Crown debts. Subject to the priority right of this class, all liabilities are by s. 186 to be satisfied pari passu.
>
> ...
>
> By assenting to an Act which altered the rights of the Crown in manner above stated, the Crown surrendered its prerogative right to come first, and necessarily surrendered also its prerogative right to enforce by writ of extent a right of priority which existed no longer.[174]

While the House of Lords ruled that the King had given up his priority by assenting to the legislation in question, at least one law lord wished it to be known that his opinion was "delivered with the most complete reservation of the point whether facts of such a nature (ordinary commercial contracts) could ever permit of the debt which has arisen being treated as a Crown debt within the scope of the royal prerogative."[175]

b. Canada

In 1962 Chief Justice Buchanan of the District Court of Alberta seized upon the expressions of reservation set forth in Food Controller v. Cork and held in The Queen v. Workmans' Compensation Board[176] that the Crown prerogative of priority does not extend to ordinary commercial or industrial contracts entered into by a government department in the course of the business or enterprise which it carries on. After quoting extensively from the House of Lords in Food Controller v. Cork and reviewing various Canadian decisions on the royal prerogative in respect of priority in conflicting debt claims, Chief Justice Buchanan adopted the sentiment of the law lords: "I therefore adopt, with respect, the views, *obiter dicta*, so vigorously expressed by the Lord Chancellor, Lord Atkinson and Lord Shaw in the *Food Controller* case."[177] Chief Justice Buchanan held that debts to the Crown of an ordinary commercial or industrial nature were "not of the kind or nature held from earliest times to be included in or covered by the royal prerogative."[178] This determination was upheld on appeal to the Alberta Supreme Court Appellate Division.[179] On the appeal, Chief Justice Smith stated that he was "in agreement with the learned trial judge and for the reason stated by him, that Her Majesty the Queen in the right of the province of Alberta, represented by the provincial treasurer, is not entitled to succeed by virtue of the royal prerogative."[180]

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[174] [1923] A.C. at 669-70.

[175] [1923] A.C. at 667. See also [1923] A.C. at 659-60 ("expression 'Crown debts' and 'debts due to the Crown' are unfortunate expressions").

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[176] 36 D.L.R. 2d 166, 175 (Alta. S.C. 1962).

[177] The Queen v. Workmans' Compensation Board, 36 D.L.R. 2d at 175.

[178] 36 D.L.R. 2d at 175.

[179] The Queen v. Workmans' Compensation Board, 42 W.W.R. 226 (Alta. S.C. App. Div. 1963).

The proposition that there is a commercial exception to the prerogative priority of the Crown has been accepted by other judges in Alberta. In Alberta Government Telephones v. Selk[181] Justice Crossley followed the decision of Chief Justice Buchanan in The Queen and Workmans' Compensation Board in determining that Alberta Government Telephones was not entitled to exercise the Crown prerogative of priority. In 1988 the Court of Appeal of Alberta applied the commercial exception as one ground for precluding Alberta Mortgage and Housing Corporation from exercising the Crown prerogative of priority in Royal Bank of Canada v. Black & White Developments Ltd.[182]

The commercial exception to the prerogative priority of the Crown has also been accepted by courts in Saskatchewan. In Re Ile à la Crosse Native Industries[183] Justice Estey accepted the principle but refused to apply it to the Minister of Northern Saskatchewan. The theory was also approved but not applied by the Quebec Court of Appeal in Sparling v. Caisse de Depot et Placement du Québec.[184] Other than these and a few similar cases,[185] the commercial exception theory has been largely ignored and sometimes rejected outside of Alberta.

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[180] 42 W.W.R. at 227.

[181] [1974] 4 W.W.R. 205 (Alta. D.C.).

[182] [1988] 5 W.W.R. 167, 174 (Alta. C.A.).

[183] [1983] 6 W.W.R. 565, 569-70 (Sask. Q.B.).

Courts in British Columbia have rejected the commercial activity exception as a workable principle of law. This was the conclusion of Justice Low of the British Columbia Supreme Court in Federal Business Development Bank v. Hillcrest Motor Inn.[186] Justice Low rejected the commercial exception to the royal prerogative of priority because of the potential difficulty a court may face in trying to determine what is and what is not commercial activity. He said:

> I believe the courts should not be in the position of determining, with inevitable inconsistency and variation of opinion, in what circumstances the Crown loses its royal mantle because of "commercial activity". I realize that the foundation of the theory is the fact that the principle of Crown immunity arose at a time when the state had little involvement in management of the national economy. Now government is very active in that area. But it seems to me that it is not for the court to determine whether any particular government activity is for the common good or

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[184] 29 B.L.R. 259, 275 (Que. C.A. 1985), affirmed without reference to the theory [1988] 2 S.C.R. 1015 (benefits/burdens principle applied).

[185] See A. Hardy Crown Priority in Insolvency 3-8 (1986).

[186] [1986] 6 W.W.R. 444, 454-55 (B.C.S.C. Chambers).

> merely to fill the coffers of state. It is for the legislative bodies to eliminate the prerogative when and if appropriate.[187]

An appeal of Justice Low's decision to the British Columbia Court of Appeal was dismissed.[188] In dismissing the appeal Justice Craig did not find it necessary to address the commercial exception to the prerogative priority but did express the view that the idea had been rejected by Chief Justice Laskin in Alberta v. Canadian Transport Commission.[189] However, the Ontario Law Reform Commission did not think that law was settled when it issued its Report on The Enforcement of Judgment Debts and Related Matters[190] in 1983. The report notes that the applicability of the prerogative of priority to "Crown debts that are commercial in nature" is an "unresolved" question.[191]

Chief Justice Dickson commented on Alberta v. Canadian Transport Commission in Alberta Government Telephones v. C.R.T.C.[192] He explained that Chief Justice Laskin was referring to "[t]he notion of a commercial exception to s. 16 of the *Interpretation Act*."[193] While the Supreme Court of Canada in Alberta Government Telephones did not rule out the possibility of a commercial exception to the Crown prerogative of priority, the Court did express a principle which would militate against the adoption of such an exception by that Court: "[T]he public policy dimension of governmental commercial activities within Canada's borders is entitled to presumptive respect."[194]

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[187] [1986] 6 W.W.R. at 454.

[188] [1988] 5 W.W.R. 466, 471-72.

[189] [1978] 1 S.C.R. 61.

[190] Ontario Law Reform Commission Report on the Enforcement of Judgment Debts and Related Matters (Part V) (1983).

[191] Ontario Law Reform Commission Report on the Enforcement of Judgment Debts and Related Matters (Part V) 27-28 (1983).

[192] [1989] 2 S.C.R. 225, 298-99.

That the door is not closed is evidenced by the more recent comments of Justice Cory in Rudolph Wolff & Co. v. Canada:[195] "There could conceivably be instances in which the Crown's activities are indistinguishable from those of any other litigant engaged in a commercial activity."

c. Australia

In coming to the conclusion that the Crown priority should not be excluded when the Crown engages in ordinary commercial activity, Justice Low of the British Columbia Supreme Court relied on the decision of the High Court of Australia in Re K.L. Tractors Ltd.[196] In that case a commercial exception to the prerogative priority was categorically rejected by all five judges sitting on the appeal. Chief Justice Dixon, joined by justices McTierran and Kitto, referred to the *dicta* of Lord Shaw in Food Controller v. Cork relied upon by Chief Justice Buchanan in The Queen v. Workmans' Compensation Board and concluded that:

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[193] [1989] 2 S.C.R. at 298.

[194] [1989] 2 S.C.R. at 300.

[195] No. 20842, at 7 (S.C.C. March 29, 1990).

[196] 106 C.L.R. 318, 336 (H.C. 1961).

> The observations of Lord *Shaw* are, of course, entitled to the greatest respect, but they were *dicta* only: his Lordship expressly said that he was "merely reserving the point". The distinction which it was sought to draw does not appear to have any foundation in theory. According to all the statements of the rule, it depends not on the nature of the origin of an obligation, but on the mere facts that there is a debt, and that the creditor is the Crown and the competing creditors are subjects. Except so far as the matter may be affected by statue, the Crown does not lose its character as the Crown by entering into a contract for the sale of land or goods. The distinction seems moreover to be incapable of practical application, and the question in the present case must be answered by saying the Commonwealth debt has priority over the debts of the other creditors.[197]

There is no doubt that the Australian High Court was correct when it said that there was no historical justification for the restriction of the Crown priority to non-commercial debts. The commercial exception to the prerogative of priority can only be explained on the basis of a change in the common law. Justice Kirby of the Alberta Supreme Court acknowledged this in Straka v.

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[197] 106 C.L.R. at 336.

Straka:[198] "the Appellate Division of this court in R. v. W.C.B. ... has held that the ancient prerogative of the Crown no longer applies in matters where the debt due the Crown is the result of the Crown engaging in everyday business and enterprise" (emphasis added).

2. One Prerogative or Two

In the course of deciding Food Controller v. Cork the House of Lords considered the question of whether the Crown prerogative of priority was in fact composed of two separate and distinct prerogatives. The question arose because of the statement made by Lord MacNaghten in Commissioners of Taxation for New South Wales v. Palmer[199] that there are two distinct prerogatives, first, a narrower one consisting of the right of the Queen to pursue her extreme rights by writ of extent or otherwise and, second, a wider prerogative that wherever the rights of the Crown and the rights of a subject to a debt of equal degree come into competition, the Crown's rights prevail.[200] Lord MacNaghten based this view on the decision of the English Court of Appeal in Re Henley & Co.[201] and on the judgment of Chief Baron Macdonald in The King v. Wells.[202] In The King v. Wells Chief Baron Macdonald identified two prerogatives: "the prerogative of having first execution ... and [the] prerogative which goes to determine the preference between two executions, one of the Crown and the other of the subject subsisting at the same time. ... [W]here the King's and the subject's title concur, the King's shall be preferred."[203]

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[198] 73 W.W.R. 759, 761 (Alta. S.C. 1970).

[199] [1907] A.C. at 184.

[200] See Re H.J. Webb & Co., [1922] 2 Ch. 369, 383-84 (C.A.).

[201] 9 Ch. D. 469, 481-82 (C.A. 1878) (followed in Re Oriental Bank Corporation, 28 Ch. D. 643, 648 (1884)).

In Food Controller v. Cork Lord Atkinson disagreed with Lord MacNaghten's characterization of the Crown prerogative of priority. Lord Atkinson stated that he preferred the opinion of the Master of the Rolls in the Court of Appeal[204] "that the Crown is not entitled to two prerogatives, but only to one prerogative enforced ... by two different methods, the right enforced by each method being the same right namely, the right to require a debtor to the Crown to pay this debt before he pays the debt he may owe to others."[205] Lord Atkinson had concurred in the judgment of Lord MacNaghten in Commissioners of Taxation for New South Wales v. Palmer in 1907, but this did not prevent him from expressing a contrary view in 1923. The majority of the House of Lords in Food Controller v. Cork shared the view that there was one prerogative of priority, not two. Lord Wrenbury opined:

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[202] 16 East 278, 281-82 (Ex. 1807).

[203] 16 East at 281-82. See also Re West and Company, 2 C.B.R. 3, 10-11 (Ont. S.C. 1921); Re Toronto Metal and Waste Company, 2 C.B.R. 138, 140 (Ont. S.C. 1921).

[204] Re H.J. Webb & Co., [1922] 2 Ch. at 383-84.

[205] [1923] A.C. at 660-61. See also C. Dunlop Creditor - Debtor Law in Canada 450 (1981) where Professor Dunlop described the Crown priority as one prerogative "put in two different ways."

> The Crown by virtue of its prerogative is entitled to say: "In payment of debts I have the right to come first -- and to enforce that right I can proceed by way of writ of extent." I should not myself describe this as two prerogative rights, of which one is larger than the other, but rather as one prerogative right and a prerogative remedy to enforce the right.[206]

Lord Wrenbury's opinion was quoted with approval by Justice Belzil of the Court of Appeal of Alberta in Royal Bank of Canada v. Black & White Developments Ltd.[207] This view is consistent with the explanation of the law found in the judgment of Justice Taunton in Giles v. Grover.[208] In that case each of the law lords set forth in great detail their understanding of the history of the prerogative of priority. Justice Taunton wrote:

> It is perfectly clear, that at common law the king had very peculiar prerogatives, much beyond the common right of a subject for the recovery of his debts. Of these, (not to mention others which are not to the present purpose,) one was, that where one was indebted to the king, and likewise to other persons, the king's debt was to be preferred in payment, that is, the king was to be paid before any other creditor of the party, and consequently, to be preferred in an execution. Mad. Exch. 183, c. 23, s. 7. The general rule is, and this has been acknowledged in all the cases, that when the right of the king and that of a subject concur, that of the king shall prevail. See the instance put

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[206] [1923] A.C. at 669.

[207] [1988] 5 W.W.R. at 174-75.

[208] 9 Bing. at 183-84.

> in *The Attorney-General v. Andrew* (Hardr. 23. Plowden, 258, 259, 264). But in ancient times the law of prerogative went farther than this, and provided the most effectual means of security, that the king's title should always be the first. It prohibited the creditors of a king's debts even from taking out execution until all the king's debts were satisfied, although the king's debts were the later in point of time; and if the king's debtor, notwithstanding, was sued or attached, the king had a remedy by writ of protection to protect his debt.[209]

While the views of Lord Atkinson, Lord Wrenbury and Justice Belzil are preferable on a theoretical basis, it matters little whether or not the prerogative of priority is divided into two or more distinct parts. All authorities are consistent in identifying the common law as the source of the Crown priority over the subject in the recovery of debts.[210] The diversity in approach to the definition of the Crown prerogative (or prerogatives) of priority only serves to confirm the conjecture set forth on page 57 above that development of the general rule of preference in favour of the Crown occurred after the Crown learned how to effectively use other prerogative powers to achieve that priority.

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[209] 9 Bing at 183-84.

[210] See Giles v. Grover, 9 Bing. at 183.

CHAPTER FIVE

THE PREROGATIVE OF PRIORITY AND SECTION 15 OF THE CHARTER

A. THE CROWN PREROGATIVE OF PRIORITY IS INCONSISTENT WITH SECTION 15 OF THE CHARTER

1. The Importance of April 17, 1985

In 1066 William the Conqueror imposed upon England a system of law described today as medieval or feudal. The medieval political system was based upon the premise of fundamental inequality among human beings. During the middle ages there was both a class structure and a political hierarchy. At the top was the King. Below the King were various lords, vassals and other less privileged members of society. The history of the British Constitution since 1066 has been the record of the quest of the subjects of the Crown to attain the equality the medieval system of law and their monarchs have denied them. In 1215 the barons demanded and obtained from King John a charter, Magna Carta, setting limits on the power of the King and granting to the barons the right to enforce Magna Carta. Among other things, Magna Carta gave the barons the right, in effect, to govern in the event the King violated his charter.[211] It was a small but important step towards equality. In 1628 and 1688 limits were again placed on the prerogative of the Crown.

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[211] W. McKechnie Magna Carta 465-77 (2nd ed. 1914).

"The Petition of Right embodied Coke's concept of 'due process of law'."[212] The Bill of Rights, along with the Act of Settlement (1700), gave statutory support to the principle of the rule of law and the idea that kings and queens were subject to the laws of England.

The principle of the rule of law has not always been understood or accepted by law makers. James I thought it treason to affirm that he was "under the law."[213] However, the Chief Justice at that time, Lord Coke, advised the King that such had been the law since the time of Bracton: "Thus wrote Bracton, 'The King is under no man, but under God and the law.' "[214] The preamble to the Charter declares that Canada is founded on principles which recognize the same conviction: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

The rule of law, however, is no more than the base upon which the constitutional guarantee of equality rights may be erected. By itself, the rule of law provides nothing but procedural protection. Professor Stone described the relationship of the rule of law to the guarantee of true equality in this way:

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[212] Lord Denning What Next in the Law 272 (1982).

[213] Lord Denning What Next in the Law 311-12 (1982).

[214] Lord Denning What Next in the Law 311-12 (1982).

> Now the quality of equal application of the rule to all persons within its scope is an attribute of every rule which is duly enforced, and can have reference to procedural safeguards only. As a criterion of justice of the rule itself it is meaningless unless some qualification to it is admitted. It is presumed that no one would wish to sustain the proposition that all rules must apply equally to all human being (including children) or even to all adults (including lunatics). For instance, one might require equal application to all persons whose situations, in relation to the reason of the rule, are indistinguishable from each other. The unjust may well be definable as "inequality without intrinsic differences". Arbitrariness on this head would consist in failure to apply equally to all members of society who *as regards the reason (or purpose or policy or end)* of that law are similarly situated; or, in other words, all laws would have to apply equally to all human beings, unless there is good reason to the contrary.[215]

The basic components of the rule of law were explained by the Supreme Court of Canada in Re Manitoba Language Rights:[216]

> The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.
>
> ...
>
> Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life.[217]

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[215] J. Stone The Province and Function of Law 262-63 (1946). See also The Queen v. Beauregard, [1986] 2 S.C.R. 56, 107 (Supreme Court of Canada not bound by the Dicey test of equality nor prevented from taking a more egalitarian approach under section 1(b) of the Canadian Bill of Rights).

[216] [1985] 1 S.C.R. 721, 747-52.

[217] Re Manitoba Language Rights, [1985] 1 S.C.R. at 748-49.

These principles, as part of the "rule of law," are woven into the fabric of the Canadian Constitution:

> The constitutional status of the rule of law is beyond question. The preamble to the *Constitution Act, 1982* states:
>
> > Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.
> >
> > (Emphasis added.)
>
> This is explicit recognition that "the rule of law [is] a fundamental postulate of our constitutional structure" (*per* Rand J., *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142). The rule of law has always been understood as the very basis of the English Constitution characterizing the political institutions of England from the time of the Norman Conquest (A.V. Dicey, *The Law of the Constitution* (10th ed. 1959), at p. 183). It becomes a postulate of our own constitutional order by way of the preamble to the *Constitution Act, 1982*, and its implicit inclusion in the preamble to the *Constitution Act, 1867* by virtue of the words "with a Constitution similar in principle to that of the United Kingdom".
>
> Additional to the inclusion of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.[218]

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[218] Re Manitoba Language Rights, [1985] 1 S.C.R. at 750-51.

The constitutional journey towards full equality within society was complete, in so far as Canada is concerned, in 1985. On April 17, 1982 the Queen signed into law the Canada Act 1982 (U.K.). Schedule B to the Canada Act 1982 was the Constitution Act, 1982. On April 17, 1985 section 15 of the Constitution Act, 1982 came into effect. Section 15 provides for equality before and under the law and the equal protection and benefit of the law. It reads as follows:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

2. The Crown is Subject to Section 15 of the Charter

Section 32(1)(a) of the Constitution Act, 1982 provides that the "Charter applies to the Parliament and Government of Canada." By virtue of section 17 of the Constitution Act, 1867, the Queen, the Senate and the House of Commons constitute the Parliament of Canada. The prerogatives of the Queen exercised in her name by cabinet are subject to the demands of the Charter.

Justice Wilson highlighted this in Operation Dismantle v. The Queen.[219] It follows that the principles of equality enshrined in section 15 of the Charter are applicable to the Crown's prerogative. For the first time since 1066 the Crown and the subject are to be equal before and under the law. There is no doubt that the Queen is given many powers as head of state which are not given to the subject. However, those powers are governmental powers to be used for governmental purposes by the Queen as chief executive officer of the nation. Any powers given to the Queen by the common law or by statute for other than governmental purposes will be subject to the demands of section 15 and the principle of equal treatment embodied in that section of the Charter.

3. General Approach to the Charter

The proper analytical approach to the Charter was succinctly stated by Justice McIntyre in Andrews v. Law Society of British Columbia:[220] "It is for the citizen to establish that his or her Charter right has been infringed and for the state to justify the infringement." The Supreme Court of Canada has required the party complaining of a Charter violation to first prove that a particular section of the Charter has been infringed. The onus then shifts to the government to justify the infringement under section 1 of the Charter. "Both purpose and effect are relevant" when considering whether a law is consistent with the Charter. In The Queen v. Big M Drug Mart[221] Justice Dickson said that "either an unconstitutional purpose or an unconstitutional effect can invalidate legislation." First the purpose, then the effect of an impugned law will be considered. This will "allow courts to dispose of cases where the object is clearly improper, without enquiring into .... actual impact."[222]

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[219] [1985] 1 S.C.R. 441, 463-64.

[220] [1989] 1 S.C.R. 143, 178.

If either the purpose[223] or the effect of a law is inconsistent with a Charter right or freedom, the law must run the gauntlet of section 1 of the Charter. The test to determine whether a limit on a Charter right or freedom is reasonable in a free and democratic society was set out in The Queen v. Oakes.[224] The Oakes test was reaffirmed as the proper test in the context of section 15 by Justice Wilson in Andrews v. Law Society of British Columbia:[225]

> The first hurdle to be crossed in order to over-ride a right guaranteed in the *Charter* is that the objective sought to be achieved by the impugned law must relate to concerns which are "pressing and substantial" in a free and democratic society.
>
> ...

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[221] [1985] 1 S.C.R. at 331.

[222] [1985] 1 S.C.R. at 332.

[223] It is the original purpose of the law which must be analyzed. The purpose for the law's continued existence will rarely, if ever, be relevant. See The Queen v. Big M Drug Mart, [1985] 1 S.C.R. at 334-36 & 353.

[224] [1986] 1 S.C.R. 103.

[225] [1989] 1 S.C.R. at 153-55.

> The second step in a s. 1 inquiry involves an application of a proportionality test which requires the Court to balance a number of factors. The Court must consider the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the legitimate goal reflected in the legislation.

4. Section 15(1) Test

The Supreme Court of Canada has refused to interpret section 15 of the Charter as mandating equality for the sake of equality. A party complaining of a violation of section 15 must establish the fact that there has been unequal treatment and, further, that such unequal treatment is discriminatory. In The Queen v. Turpin[226] Justice Wilson summarized the section 15 test in this way:

> [S.] 15 mandates a case by case analysis as was undertaken by this Court in *Andrews* to determine 1) whether the distinction created by the impugned legislation results in a violation of one of the equality rights and, if so, 2) whether that distinction is discriminatory in its purpose or effect.

Justice Wilson quoted with approval Justice McIntyre's definition of discrimination in Andrews v. Law Society of British Columbia:[227]

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal

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[226] [1989] 1 S.C.R 1296, 1334.

[227] [1989] 1 S.C.R. at 174.

> characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[228]

Recalling that the rights or freedoms guaranteed by the Charter must be interpreted and applied in light of their purpose, Justice Wilson held in The Queen v. Turpin that discrimination is an essential element in section 15 because it is the existence of discrimination which threatens the values protected by section 15.[229]

The purposive approach to the interpretation and application of section 15 of the Charter has led the Supreme Court of Canada to focus on enumerated and analogous grounds of discrimination when answering the question of whether a "distinction is discriminatory in its purpose or effect."[230] Under the "enumerated and analogous grounds" approach the Supreme Court of Canada has focused on "personal characteristics" when determining whether a law is discriminatory. The court has asked "whether there is discrimination on grounds relating to the personal characteristics of the individual or group" complaining of a violation of section 15.[231] "This approach is not surprising considering the fact that every type of discrimination listed in section 15(1) involves a personal characteristic of the victim."[232] The enumerated and analogous grounds approach has, however, been the subject of some academic criticism.[233]

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[228] [1989] 1 S.C.R. at 1331.

[229] [1989] 1 S.C.R. at 1331. See also The Queen v. Big M Drug Mart, [1985] 1 S.C.R. at 344.

[230] The Queen v. Turpin, [1989] 1 S.C.R. at 1332, 1334. See also Brochner v. MacDonald, [1989] 6 W.W.R. 257, 258 (Alta. C.A.).

In order to identify the type of discrimination section 15 was intended to prevent, it is necessary to understand the purpose of that section. In Andrews v. Law Society of British Columbia Justice McIntyre explained the purpose of section 15:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in a knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.[234]

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[231] The Queen v. Turpin, [1989] 1 S.C.R. at 1331.

[232] D. Gibson The Law of the Charter: Equality Rights 159 (1989).

[233] D. Gibson The Law of the Charter: Equality Rights 143-61 (1989); Wakeling and Chipeur "An Analysis of Section 15 of the Charter After the First Two Years or How Section 15 Has Survived the Terrible Twos" 25 Alta. L. Rev. 407, 428-31 (1987).

[234] [1989] 1 S.C.R. at 171.

Justice McIntyre was of the view that the enumerated grounds in section 15(1) served the useful purpose of highlighting some of the most socially destructive forms of discrimination:

> The enumerated grounds in s. 15(1) are not exclusive and the limits, if any, on grounds for discrimination which may be established in future cases await definition. The enumerated grounds do, however, reflect the most common, and probably the most socially destructive and historically practiced bases of discrimination and must, in the words of s. 15(1) receive particular attention. Both the enumerated grounds themselves and any other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a "continuing framework for the legitimate exercise of governmental power" and, at the same time, "the unremitting protection" of equality rights.[235]

Section 15 celebrates the values the rule of law represents.[236] According to Justice McIntyre, the goal of section 15 is "to approach the ideal of full equality before and under the law."[237] In The Queen v. Turpin, Justice Wilson also focused on the rule of law as one of the important values section 15 was intended to uphold:

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[235] [1989] 1 S.C.R. at 175.

[236] See J. Rawls A Theory of Justice 237 (1971) and see discussion on pages 80-82 above.

[237] Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. at 165.

> [T]he guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others. This value has historically been associated with the requirements of the rule of law that persons be subject to the law impartially applied and administered.[238]

5. Purpose of the Crown Priority Conflicts With Section 15

a. Inequality and Discrimination

The right to equality guaranteed in section 15 of the Charter is infringed when distinctions made by government and based upon "irrelevant personal differences" have the purpose or effect of creating inequality among equals. In Andrews v. Law Society of British Columbia Justice McIntyre divided this question into two separate components. Justice Cory highlighted this two part test in Rudolph Wolff & Co. v. Canada:[239]

> The manner in which a court must approach an alleged infringement of s. 15(1) was set forth by McIntyre J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. He made it clear that one complaining of the violation of s. 15 must show "not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory."

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[238] [1989] 1 S.C.R. at 1329.

[239] No. 20842, at 6 (S.C.C. March 29, 1990).

In The Queen v. Turpin,[240] Justice Wilson said that the test required a court "to determine 1) whether the distinction created by the impugned legislation results in a violation of one of the equality rights and, if so, 2) whether that distinction is discriminatory in its purpose or effect."

b. Proper to Compare Subject With Crown When Crown Acting in Nongovernmental Capacity

The first question which must be answered is whether the Crown priority violates one of the equality rights set forth in section 15. Does the prerogative priority treat the Crown and subject unequally? There is no doubt that it does. However, Justice Cory, in Rudolph Wolff & Co. v. Canada,[241] highlighted another important consideration which must be taken into account when applying section 15 to the Crown. Not every action of the Crown need run the section 15 gauntlet. A comparison of the Queen and a subject under section 15 will only be just and appropriate, if at all, where the Queen is not acting in her governmental capacity, for example, where "the Crown's activities are indistinguishable from those of any other litigant engaged in a commercial activity."[242] When the Queen is acting in her "governmental capacity" she "is simply not an individual with whom a comparison can be made to determine whether a s. 15(1) violation has occurred."[243] Justice Cory did not find it necessary for the purposes of that case "to consider the further conclusions of Henry J. [the motions court judge] that the Crown can never be compared with individuals under s. 15(1) of the *Charter* in the context of any statute governing the relationship between the Crown and the subject in civil proceedings."[244]

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[240] [1989] 1 S.C.R. at 1334.

[241] No. 20842 (S.C.C. March 29, 1990).

[242] Rudolph Wolff & Co. v. Canada, No. 20842, at 7 (S.C.C. March 29, 1990).

Justice Reed of the Federal Trial Court addressed this issue in Lennox Industries (Canada) v. The Queen:[245]

> I do not think the Crown's priority claim in this case is a distinction or an inequality to which section 15 was meant to apply. The situation might be different if the Crown were operating in a commercial or trade capacity and had incurred debts on the same basis as the private citizen. But in the collection of Income Tax the Crown is not acting as a private person would, it is acting in its governmental capacity.

The principle expressed by Justice Reed is consistent with Justice Cory's comments in Rudolph Wolff & Co. v. Canada. However, the application of the principle by Justice Reed is erroneous. Federal legislation granting the Crown priority in the collection of income tax would no doubt be immune from section 15 scrutiny, but the Queen is not relying on income tax legislation when she asserts her prerogative priority. The exercise of such prerogative is not dependent upon the existence of some governmental purpose. The prerogative priority was given to the Queen for her use whether or not she was acting "exclusively in [her] governmental capacity."[246] Her priority "depends not on the nature of the origin of the obligation, but on the mere fact that there is a debt, and that the creditor is the Crown and the competing creditors are subjects."[247] If the prerogative of priority does not depend on the nature of the origin of the obligation (taxes, contract, tort) then it cannot be said that the Queen is acting in her governmental capacity when she exercises such prerogative.

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[243] At 7.

[244] At 7. There is nothing in the legislative history of section 15 which would assist the courts when considering this issue. See A. Bayefsky Canada's Constitution Act, 1982 and Amendments: A Documentary History (1989).

[245] [1987] 1 C.T.C. 171, 174 (F.C.T.D.). See also Wentzell "The Charter Equality Guarantee and The Crown Priority" 35 Can. Tax. J. 416, 419 (1987) (where the Crown acts "in a manner similar to a private creditor ... the Crown priority may not satisfy the equality tests of section 15").

In Lennox Industries Justice Reed posed the right question but provided the wrong answer when she asked whether the Crown was "acting as a private person would?"[248] The question is whether the Queen is acting as a private person would in proceeding to enforce her debts by way of writ of execution. The answer clearly is yes! The subjects of the Crown use the same judicial process to collect their private debts. A writ of execution binds property in the same manner, regardless of whether the debts upon which the writ is founded are characterized as taxes, contractual payments or damages for a negligent act and regardless of the identity of the party causing the writ to be issued. The same could be said regardless of the form of writ chosen by the Crown. None of the writs, not even the writ of extent, available to the Crown are restricted to debts owing to the Queen in her "governmental capacity."

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[246] Rudolph Wolff & Co. v. Canada, No. 20842, at 7 (S.C.C. March 29, 1990).

[247] Re K.L. Tractors Ltd., 106 C.L.R. at 336.

[248] Lennox Industries (Canada) v. The Queen, [1987] 1 C.T.C. at 174.

The answer to the above question would be different if the question was modified to read: is the Crown acting as a private citizen in creating taxes? The creation of legislation, the declaration of war and the calling of elections are all without analogy in the private sphere. The subject cannot complain because only the Crown or the government can carry out these and similar "governmental" functions. Geoffrey Marshall commented on the equality of state and individual before the law in his book, Constitutional Theory:

> It is in one way plain that the State and the individual, or the community and citizen, cannot be equals. One imposes its will upon the other. We can, however, significantly debate which community purposes require the community's agents to be given significant legal privileges not shared by private persons or collectivities.[249]

The Queen is acting in her governmental capacity when she exercises her direct prerogatives. She is not, however, acting in her governmental capacity when she exercises her incidental prerogatives. The incidental prerogatives, which include the prerogative of priority, are generally comparable to the activities of a private person. In connection with incidental prerogatives, Maitland said that there is "hardly a power for which an analogy cannot be found elsewhere."[250] Holdsworth supported this view with the statement, which he attributed to Coke, that the prerogative may be defined as "exceptions in favour of the Crown to those general rules that are established for the rest of the Community."[251]

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[249] G. Marshall Constitutional Theory 139 (1971).

As an incidental prerogative of the Crown, the prerogative of priority is subject to section 15 of the Charter. The Queen is not acting in her capacity as chief executive officer of the nation when relying upon incidental prerogatives such as the prerogative of priority. Rather, she is relying upon her common law right as royalty to take precedence over her subjects.

The direct prerogatives, on the other hand, are properly excluded from the ambit of section 15 of the Charter. Blackstone identified the direct prerogatives as the executive powers of the Crown as "head and representative of the state."[252] The distinction between the direct and incidental prerogatives of the Crown is important for the purposes of the Constitution of Canada because of the different treatment accorded the direct and incidental prerogatives thereunder. For example, the effect of section 129 of the Constitution Act, 1867 is to subject the incidental prerogatives to the civil law of Quebec as it stood on July 1, 1867 and validly amended by competent legislation of the Parliament of Canada under section 91 or the legislature of Quebec under section 92, subsection 92(13) in particular.[253] The direct prerogatives of the British monarch were not affected by Quebec civil law.[254] Justice L'Heureux-Dubé explained the reason for this divergent treatment in Laurentide Motels v. Beauport:

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[250] 3 W. Holdsworth A History of English Law 460 (3rd ed. 1923).

[251] 3 W. Holdsworth A History of English Law 460 (3rd ed. 1923); 10 W. Holdsworth A History of English Law 342 (3d ed. 1923).

> The Quebec Act of 1774 sealed the fate of the two major legal systems that would govern the law applicable in Quebec: French civil law as it stood before 1760 with its subsequent amendments in Quebec for everything relating to property and civil rights, and the common law as it stood in England at that time, and as subsequently amended, for what related to public law.[255]

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[252] 10 W. Holdsworth A History of English Law 342 (3rd ed. 1923). See also 3 W. Holdsworth A History of English Law 459 (3rd ed. 1923); S. de Smith Constitutional and Administrative Law 140 (5th ed. 1985).

[253] Laurentide Motels v. Beauport, [1989] 1 S.C.R. 705, 737-38 & 788.

[254] Exchange Bank v. The Queen, 11 App. Cas. at 159 (Crown priority being an incidental and not direct privilege of the Crown it is subject to Quebec civil law).

[255] [1989] 1 S.C.R. 705, 737.

Justice L'Heureux-Dubé went on to cite with approval Walton's clear explanation of which prerogatives are available to the Crown in Quebec:

> Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (1980), writes (at p. 54):
>
>> In regard to the position of the sovereign and the prerogatives of the crown we have to distinguish between rights which are properly speaking constitutional and rights of a pecuniary nature which belong to the crown.
>>
>> The former group of rights belong to the public law of the Empire and since the Cession are governed by the laws of England.
>>
>> The latter group belong to the private law and are regulated in this Province by the French civil law.
>>
>> This distinction is expressed by old writers in dividing the prerogatives of the crown into major and minor.[256]

The direct or executive prerogatives are part of the Constitution of Canada by virtue of section 9 of the Constitution Act, 1867 read in conjunction with the preamble thereto.[257] They would not be affected by a determination that the incidental pecuniary prerogatives of the Crown, in whole or in part, are inconsistent with the Charter.

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[256] [1989] 1 S.C.R. at 788.

[257] W. McConnell Commentary on the British North America Act 29-33 (1977).

As has been explained, there is no reason the Crown cannot be compared to a common person in the context of the exercise of an incidental prerogative of the Crown. However, beginning with Kurolak v. Saskatchewan,[258] a line of cases has held that the Crown cannot be compared with a common person for the purposes of section 15 because the Crown is not and cannot be an individual.[259] Kurolak is not a compelling decision because of the circular reasoning employed by the Saskatchewan Court of Queen's Bench in that case. The court held that section 15(1) did not apply to the Crown because "the Crown is not equal to others," a conclusion which begs the question raised. Kurolak and the other cases in this line of authority cannot be squared with precedent. In The Queen v. Bank of Nova Scotia[260] Justice Strong stated that it is settled beyond controversy that "Her Majesty the Queen is, in her own royal person, the Head of" the government of Canada. The Queen is a person, an individual. When the medieval writers spoke of the monarch, they spoke of a person, not a theoretical entity.[261] The same principles of law apply today. In Quebec v. Labrecque[262] Justice Beetz confirmed that under the Canadian system of law the Queen is a physical person. In that case Justice Beetz had to consider the question of whether a contract of employment existed between the province of Quebec and a civil servant or, as the province asserted, there existed a special legal relationship based on the royal prerogative. Justice Beetz refused to extend the royal prerogative to cover the relationship between the province and its employees and said:

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[258] [1986] 4 W.W.R. 323 (Sask. Q.B.).

[259] See Sebastian v. Saskatchewan, 31 C.R.R. 350, 353 (Sask. Q.B. 1987); The Queen v. Stoddart, 20 O.A.C. 365 (C.A. 1987); Wright v. Canada, [1988] 1 C.T.C. 107, 109 (Ont. Div. Ct. 1987).

[260] 11 S.C.R. 1, 19 (1885).

[261] 2 Bracton on the Laws and Customs of England 33 (S. Thorne trans., ed. 1968).

[262] [1980] 2 S.C.R. 1057, 1082-83.

> It is also important to note that in Anglo-Canadian law, the relationship between a civil servant and his employer is not, strictly speaking, a relationship with an abstract being, the state: It is a relationship with a relatively more concrete entity, the Crown, which "personifies the state", in the expression of Griffith and Street, *The Principles of Administrative Law*, 5th ed., 1973, at p. 246, but exercises only executive authority: s. 9 of the *British North America Act, 1867*. The Crown is also the Sovereign, a physical person who, in addition to the prerogative, enjoys a general capacity to contract in accordance with the rule of ordinary law. This general capacity to contract, like the prerogative, is also one of the attributes of the Crown in right of a Province: *Verreault & Fils v. Attorney General of Quebec*.
>
> Modern English law, hostile to the extension of the royal prerogative, is unwilling to use it to explain a legal situation which can just as well be explained by the general capacity of the Crown.[263]

This explanation of the legal position of the Queen again highlights the nature of the Queen under the Canadian Constitution. The Queen is both the chief executive officer of Canada, personifying the state and exercising the direct prerogatives, and, at the same time, a physical person, exercising the incidental prerogatives.

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[263] [1980] 2 S.C.R. at 1082-83.

Based on Justice Cory's decision in Rudolph Wolff & Co. v. Canada[264] no question of inequality of treatment between the Queen and subject will arise in the context of the creation of tax laws by Parliament. Parliament may specify both the manner in which the tax is to be calculated and the manner in which the Queen as representative of the government of Canada may collect such tax. No complaint under section 15 of the Charter could be raised if Parliament gave the Queen acting in her capacity as representative of the government of Canada a priority over other creditors for taxes owing to the Queen. However, Parliament has not enacted such a priority. In this case, the Queen as representative of the government of Canada is relying on one of the prerogative powers of the Queen as sovereign, a physical person. The Queen may not shield one of her incidental or nongovernmental prerogatives from the effect of the Charter and, in particular, the rule of section 15 of the Charter by using such nongovernmental prerogative for an executive or governmental purpose. The Queen may not hide the incidental prerogatives behind the direct prerogatives. If she could, then the prerogative of priority, an incidental prerogative, could be exercised in Quebec, but the Supreme Court of Canada has never accepted such a proposition. A clear division has been made in

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[264] No. 20842 (S.C.C. March 29, 1990).

Quebec between the Queen's public law and private law prerogatives. This division is also significant for all of Canada for the purposes of the Charter. The incidental prerogatives will only be available to the Queen as representative of the government of Canada if and to the extent such incidental prerogatives are consistent with the values and principles of the Charter.

The Queen is acting (or, in reality, is acting on behalf of the government) as a physical person in her nongovernmental capacity when she asserts an incidental prerogative such as the prerogative of priority. Therefore, a comparison of the treatment afforded the Queen under the prerogative with that afforded the subject is "just and appropriate."[265]

c. The Prerogative of Priority Violates Equality Rights in Section 15(1) of the Charter

The first part of the Supreme Court's two-part section 15 test is a determination of whether the distinction created by the impugned law results in a violation of one of the equality rights set forth in section 15 of the Charter.[266] The Crown prerogative of priority in purpose and in effect violates all four equality rights.

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[265] Rudolph Wolff & Co. v. Canada, No. 20842, at 7 (S.C.C. March 29, 1990).

[266] See Bayefsky "Defining Equality Rights" in Equality Rights and The Canadian Charter of Rights and Freedoms 1-25 (A. Bayefsky and M. Eberts 1985) for an extensive discussion of the four equality rights in section 15.

Equality before the law is violated when the common law allows the Queen to stand above the ordinary law which applies to all others in Canada. In The Queen v. Eldorado Nuclear[267] Justice Dickson said that the Crown's prerogative "seems to conflict with basic notions of equality before the law."[268] Equality under the law is violated for the same reason, the common law gives the Queen priority over all other creditors with claims of equal degree with the claims of the Crown. Equal protection of the law is denied when the subject is not given equal opportunity with the Queen in the collection of debts. Equal benefit of the law is also denied. The law gives to the Queen a benefit not allowed to any other individual, the right to have her claims paid first.

In The Queen v. Turpin, Justice Wilson turned to The Queen v. Drybones[269] for assistance in defining the right to equality before the law found in section 15 of the Charter: " '[E]quality before the law' ... means at least that no individual or group of individuals is to be treated more harshly than another under that law."[270] The prerogative of priority has just such harsh effect on subjects who have claims of equal degree with the Crown. Under the common law prior to the Charter creditors with claims of equal degree with those of the Crown were not entitled to any payment on such debts until the Crown's claims were satisfied in full.[271]

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[267] [1983] 2 S.C.R. 551.

[268] 2 S.C.R. at 558. See also J. Chitty Prerogatives of the Crown 261-62 (1820) and S. de Smith Constitutional and Administrative Law 146-47 (5th ed. 1985).

[269] [1970] S.C.R. 282, 297.

[270] The Queen v. Turpin, [1989] 1 S.C.R. at 1329.

d. Purpose of Prerogative of Priority is Discriminatory

i. Prerogative Priority Product of Medieval Society

The second part of the Supreme Court's two part test is a determination of whether the distinction in question is discriminatory in its purpose or effect. It would be rare for a law to be discriminatory in purpose. It is not often that a legislature is improperly used by one part of society to discriminate against an individual or group of individuals in society. The Lord's Day Act passed by Parliament in 1907 is an example of such improper legislative action.[272] The purpose of the common law rule of Crown priority is inconsistent with the principles of equality enshrined in section 15 of the Charter. It is one of the few laws with a purpose inimical to the Charter.

The prerogative of priority along with the other incidental prerogatives of the Crown were developed in a society founded upon the presupposition of inequality among persons. The prerogative of priority was intended to recognize and perpetuate inequality between the Crown and the subject. A priority in favour of the King was justified on the basis of the legal theory that "The King [had] no equal within his realm [and] [subjects] [could] not be the equals of the ruler."[273] The anti-egalitarian purpose for which the prerogative of priority was originally given to the King is well illustrated in the 1680 booklet *Jura Coronae*. In the postscript to *Jura Coronae* the author, John Brydall, said:

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[271] Household Realty v. Canada, [1980] 1 S.C.R. 423, 426 (1979).

[272] The Queen v. Big M Drug Mart, [1985] 1 S.C.R. at 351 (enforcement of religious observance of day of rest of one particular religion not a legitimate object of government). See also Takahashi v. Fish and Game Commission, 68 S. Ct. 1138, 1144 (1948) (California state law barring those ineligible to citizenship from securing commercial fishing licenses was direct outgrowth of antagonism toward persons of Japanese ancestry. Cursory examination of background of statute demonstrated that it was designed solely to discriminate against such persons in a manner inconsistent with the concept of equal protection of the laws.).

> I shall presume to detain the Reader a while longer with a Prospect of some other Privileges and Preheminencies, which were Originally reserved to the Crown, and are part of the Common-Law of England; and they are such as these:
>
> ...
>
> 22. A Common Person shall not have Execution against the Kings Debtor, until Agreement for the Kings Debt.
>
> ...
>
> 28. When the Title of the King and a Subject concur, the King's Title shall be preferred.
>
> ...
>
> 29. The King may grant a Protection to protect his Debtor.
>
> ...
>
> 34. By Order of the Common Law, the King for his Debt had Exemption of the Body, Lands, and Goods of the Debtor.

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[273] 2 *Bracton on the Laws and Customs of England* 33 (S. Thorne trans., ed. 1968).

...

> To come to a Conclusion; The Law of *England* hath so much Reverence and Honour for our King, that it alloweth him (as Gods Viceregent on Earth) divine Attributes
>
> ...
>
> The Close of all shall be this.
>
> We read in History, that the Heathens by the very Instinct of Nature, had a marvelous Reverence and Veneration, for their Princes; if so, what a Shame is it, for those Christians whom men call Quakers, That neither the Laws of Nature, of God, nor Man, are prevalent enough to persuade them to vail their Bonnets, when they appear in our Courts of Judicature, where the King resides by Representation? but we need not wonder at this, when they are so impudent as to be covered (as I have been informed,) where the King is personally present, contrary to the laudable Custom of the Sacred Palace; and what that Custom is, let Sir Thomas Smith inform those Miso-Monarchists. *viz.*
>
> *--No man speaketh to the Prince, nor serveth at the Table but in Adoration and Kneeling; All Persons of the Realm be bare headed before him; insomuch that in the Chamber of Presence, where the Cloath of Estate is set, no man dare walk; yea though the Prince be not there, we men dare tarry there, but bare headed.*[274]

According to Holdsworth, the middle ages saw the King assert his right to a privilege or exception in every case where the rights of the King and the rights of the subject came into conflict:

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[274] J. Brydall Jura Coronae 127-34 (1680).

> It has been very truly said that, in the Middle Ages, the royal prerogative often appears to be simply some advantage over the subject which the law gives to the king when their rights conflict.
>
> ...
>
> During the mediaeval period the king was regarded quite as much as a superior feudal lord with special privileges as a ruler entrusted with the executive powers of the state. It is for this reason that the doctrines as to those prerogatives which Blackstone calls "incidental" were then elaborated.[275]

The pseudo-statute De Prerogativa Regis, 17 Edward II defined the prerogative as it was understood during the feudal period:

> Prerogativa is as muche to saye as a privilege or a preeminence that any person hath before another whiche as it is tolerable in some, so it is most to be permitted and allowed in a prince or soveraine governor of a realme. For besydes that, that he is the most excellentest & worthiest parte or member of the comon body of the welth, so is he also (through his good governaunce) the preserver, nourisher, and defender of all the people beeing the rest of the same bodye. ... for which cause the lawes do attribute unto him all honour, dignity, prerogative and preeminence, which prerogative doth not onely extend to his own person, but also to all other his possessions goods and cattals.[276]

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[275] 3 W. Holdsworth A History of English Law 329, 459 (3rd ed. 1923).

[276] Reproduced in Classics of English Legal History in the Modern Era (D. Berkowitz and S. Thorne 1978-79). See also M. Hale The History of the Common Law of England 107 (C. Gray 1971) (originally published 1739) (De Prerogativa Regis for the most part a collection of the Crown's prerogative that were "known law long before" the time of Edward II (1307 - 1327)).

John Reeves was of the view that the King was able to aggrandize power and position because of the medieval theory of subjugation and submission accepted in England at the time the incidental prerogatives developed:

> Besides the uncertain condition of our legal polity, other causes, rooted in the constitution of the government, contributed to arm the king with extraordinary powers. The strict feudal submission of a vassal to his liege lord encouraged the notion of an entire obedience in all things to the king, who being supreme over all the lords in his kingdom, was, of course, to surpass them in the petty prerogatives which they themselves claimed within their own demesnes. These various causes concurring with the immense authority possessed by the first Norman king, enabled this race of monarchs to assume prerogatives, and exercise acts of sovereignty, to the last degree oppressive and tyrannical.[277]

The medieval influence on the prerogative is still strongly reflected in modern definitions of the royal prerogative such as that found in Halsbury's:

> The royal prerogative may be defined as being that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her regal dignity, and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England.[278]

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[277] 1 J. Reeves History of English Law From the Time of the Saxons to the End of the Reign of Philip and Mary 206 (2d ed. 1787).

[278] 8 Halsbury's Laws of England 583 (4th ed. 1974).

ii. Medieval Courts Gave Priority to the "Worthier"

The original justification for the prerogative of priority can be summarized in two words: *detur digniori.* Other than a line of cases out of the courts of Ireland, there has been little judicial consideration of the origin and justification of the English Crown's prerogative of priority. Justice Gavan Duffy, in considering the claim of prerogative priority asserted by the government of Ireland, concluded that the claims of the Crown were preferred at common law "not because he was the executive authority, but by reason of the pre-eminence which he enjoyed at common law over all persons, on the principle expressed in the phrase *detur digniori.*"[279] The same proposition was accepted by Justice Kingsmill Moore in the later case of Re Irish Employers Mutual Insurance Association.[280] In that case Justice Kingsmill Moore postulated that the prerogative originated as a means of helping "a usually impoverished monarch in the collection of his personal income," noting that it would have been justifiable by "his supereminent position as paramount overlord."[281]

On the appeal of Re Irish Employers Mutual Insurance Association the Supreme Court of Ireland unequivocally rejected the prerogative of priority as applicable in Ireland because the exercise of the prerogative of priority would be inconsistent with the Irish Constitution. Justice Murnaghan of the Supreme Court of Ireland gave the following reasons for his conclusion that there was no room under the Irish Constitution for the Crown prerogative of priority:

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[279] Re P.C., an Arranging Debtor, [1939] I.R. 306, 314.

[280] [1955] I.R. at 199.

[281] [1955] I.R. at 204. See also discussion on pages 19-23 & 44-47 above.

> Mr. Justice Kingsmill Moore has traced in his elaborate judgment the history of that part of the royal prerogative by which priority was given to debts due to the Crown. In the form of government developed in England the Courts were the Courts of the king and the judges of the Courts were the king's judges. Crimes were acts against the king's peace and the revenue derived from taxes and duties was granted to the king. The judges in very early times, owing to the pre-eminent dignity of the king, ruled that the claims of subjects could not come into competition with the right of the Crown and thereby awarded a priority of payment in favour of Crown debts.
>
> In whatever manner the rules of law in force in Ireland came to be established they were adopted by Article 73 of the Constitution of 1922 if not inconsistent with the Constitution. Article 73 reads -- "Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Eireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas." This Constitution set up three organs of government, the legislature, the executive and the judicature. The king was part of the legislature and was represented by a governor general. Article 2 of the Articles of Agreement for Treaty between Great Britain and Ireland provided: -- "Subject to the provisions hereinafter set out ... the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State."
>
> Speaking generally, however, in my opinion the structure of the State was no longer in conformity with the British pattern.
>
> ...

> In my opinion there is no room for that part of the prerogative which gave Crown debts priority of demand.[282]

The feudal concept of *detur digniori* is the antithesis of the principle of equality enshrined in section 15. Even the royalist writers at the height of the prerogative recognized the inequality their theories created:

> By the Law of Nature ... all persons [were] equal, ... there was neither King nor Subject; then came in the Law of Nations, which did limit the Law of Nature ... which brought in Kings and Rulers, which took away equality of persons.[283]

A law premised on inequality among persons and intended to perpetuate such inequality cannot be reconciled with section 15 of the Charter. Such a law has an unconstitutional purpose; a purpose destructive of the values section 15 was enacted to preserve and promote.

A law arising out of the medieval political system and based on the inequality among persons inherent in that system cannot pass the purpose test set out in The Queen v. Big M Drug Mart[284] and reiterated in The Queen v.

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[282] Re Irish Employers Mutual Insurance Association Limited, [1955] I.R. at 240-41.

[283] J. Davies The Questions Concerning Impositions 29 (1656). See also M. Judson The Crisis of the Constitution 167 (1964).

[284] [1985] 1 S.C.R. at 351 (a law will be struck down if it possesses an unconstitutional purpose).

Oakes.[285] The prerogative of priority is in direct conflict with the purpose of section 15 highlighted by Justice McIntyre in Andrews v. Law Society of British Columbia: "the promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[286] The prerogative of priority is based on the idea that the Queen is deserving of more respect than other human beings. That concept is not acceptable in a modern free and democratic society.

iii. Discrimination in Favour of Advantaged Majority or Minority Prohibited by Section 15 of the Charter

In The Queen v. Turpin[287] Justice Wilson said that the "similarly situated similarly treated test" had been rejected in Andrews because of the narrow focus of such test on the "four corners of the impugned legislation."[288] She also repeated her statement in Andrews "that the determination of whether a group falls into an analogous category to those specifically enumerated in s. 15 is 'not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society.' "[289] This characterization of the analysis required by section 15 led Justice Wilson to concentrate on the question of whether Sharon Turpin was a member of a "discrete and insular minority."[290] That question shifted the inquiry away from a determination of whether Sharon Turpin as an "individual" had suffered discrimination to a determination of whether Sharon Turpin's group had suffered discrimination.

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[285] [1986] 1 S.C.R. at 138.

[286] [1989] 1 S.C.R. at 171.

[287] [1989] 1 S.C.R. 1296.

[288] [1989] 1 S.C.R. at 1332.

The danger, of course, in focusing on the group is that courts will tend to reject claims of discrimination from individuals among majority groups or among groups otherwise clearly advantaged in society. However, the harmful effects of inequality are no less severe for the individual who is a member of a majority group. It is the individual who is primarily protected by section 15. Groups are only protected to the extent necessary to preserve the integrity of the individual.[291]

The discrimination at issue in the context of the Crown prerogative of priority creates a number of analytical problems. First, while the Queen is a member of a minority group of one in connection with her prerogative of priority, she is clearly advantaged by that prerogative. Second, in legal theory the Queen is a single legal entity, a corporation sole, however, in political reality she is controlled (with few exceptions) by and representative of the nation as a whole or at least the governing political party. Third, those who actually suffer from the exercise of the prerogative of priority have nothing in common with each other, except the same debtor, the Crown.

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[289] [1989] 1 S.C.R. at 1332.

[290] [1989] 1 S.C.R. at 1332-33.

[291] Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, 397-98 ("The group or organization is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations. People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. ... [T]he group can exercise only the constitutional rights of its individual members on behalf of those members.")

There are two ways in which the discriminatory effect of the Crown prerogative of priority could be analyzed. The privilege given to the Queen to have debts owing to her paid first could be compared with the law affecting her subjects which gives them, as "commoners", no such priority.[292] Alternatively, one could compare the rights of the Queen as representative of the government or people of Canada or of a province to priority in the payment of debts with the rights of other creditors in society. The rights of the Queen are vastly superior. The latter approach would be appropriate if the prerogative of priority were a direct or political prerogative. However, the prerogative of priority is an incidental or personal prerogative of the Queen. While it is true that incidental prerogatives of the Queen are at the disposal of the government they do not thereby become "governmental." If the prerogative of priority were a governmental or executive prerogative then the courts would not even commence analysis under section 15 of the Charter.[293] In addition, discrimination on the basis of the nature of the creditors of a particular debtor is unlikely to be considered an analogous ground of discrimination under section 15. If, however, the Crown when acting governmentally could be compared, for the purposes of section 15, with a subject of the Crown and if discrimination between creditors on economic grounds was analogous to discrimination on the basis of one of the grounds listed in section 15, the Crown prerogative of priority would clearly violate section 15. The discriminatory treatment accorded creditors who share debtors with the Crown would have to be justified under section 1 of the Charter or declared to be of no force or effect.

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[292] See pages 124-27 below, notes 318 & 319 in particular.

The United States Supreme Court considered discrimination such as that described above in Duke Power Company v. Carolina Environmental Study Group.[294] In that case the Supreme Court had to rule on the constitutional validity of legislation which treated "those injured in nuclear accidents" different than "those whose injuries derived from other causes."[295] The Court subjected the discrimination to "equal protection" analysis under the U.S. Constitution and determined that the difference in treatment was amply justified by "the important congressional purpose of encouraging private participation in the exploitation of nuclear energy."[296] Where there has not been a correlation between the limitation on the right to equal treatment and an important governmental objective, American state supreme courts have not been as willing to uphold the constitutional validity of the limitation.[297]

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[293] See Rudolph Wolff & Co. v. Canada, No. 20842, at 7 (S.C.C. March 29, 1990)(subject not comparable with Crown when Crown acting in "governmental" capacity).

[294] 438 U.S. 59 (1978)

[295] 438 U.S. at 93-94.

Because the Crown when acting governmentally cannot be compared for the purposes of section 15 of the Charter with one of Her Majesty's subjects and because economic discrimination is unlikely to be considered analogous to the other types of discrimination found in section 15, an approach different from that employed in American equal protection cases must be followed in order to analyze the Crown prerogative of priority under section 15. The special right given to the Queen, her incidental prerogative to have debts owing to her paid first, must be compared with the rights of her subjects to collect debts owing to them. The discrimination inherent in this common law prerogative of the Queen is apparent. It is proper to compare the subject with the Crown when considering the constitutional validity of the prerogative of priority under section 15. This is because the Queen is not exercising a direct or governmental prerogative when she asserts her right to priority.[298] The fact that the Queen now only acts on the advice of the government and allows the government to act in her name is irrelevant. The law only recognizes the Queen; it knows no other legal entity under the Canadian Constitution. The prime minister and the premiers and their cabinets will find no reference to themselves in the Constitution Act, 1867, which refers only to the Queen in connection with the executive power.[299] The common law gave the prerogative of priority to the Queen, not to her government. The priority was given to recognize her superior dignity as expressed in the latin phrase *detur digniori*. If the government wishes to assert a different purpose for a priority in the collection of debts it must legislate such priority for such different purpose.

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[296] 438 U.S. at 93. This analysis is similar to that entered into by Canadian courts under section 1 of the Charter.

[297] Wright v. Central DuPage Hospital, 63 Ill. 2d 313, 347 N.E. 2d 736 (1976)($500,000 limit on recovery for damages for medical malpractice ruled invalid); Jones v. State Board of Medicine, 97 Idaho 859, 555 P. 2d 399 (1976)($150,000 limitation on recovery and limitations on remedies for medical malpractice; remanded for consideration consistent with principle that there must be a correlation between limitation on recovery of damages and the promotion of health care for the people of Idaho).

In legal theory,[300] the Crown prerogative of priority favours the Queen *in persona* at the expense of one or more of her subjects. The discrimination inherent in the prerogative of priority affects each subject individually but is based on a personal characteristic shared in common by all, none are royalty and, therefore, none are, according to the common law, worthy of the respect, honour and privileges bestowed upon the Queen. Because the subjects of the Crown are in the majority, it might be argued that they have the political system at their disposal and need not rely on the Charter to correct this inequality. Should a complaint of discrimination under section 15 be dismissed because the discrimination does not adversely affect a "discrete and insular minority?" Gwen Brodsky and Shelagh Day say yes. They write that:

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[298] See discussion on pages 94-101 above.

[299] F. MacKinnon The Crown in Canada 16 (1976)

[300] Most references in our legal system to the Queen are references to the Queen in theory. Only rarely is the Queen an active participant as an individual in government. Nevertheless, the law only knows the person of the Queen. While the law may distinguish her as chief executive of various jurisdictions, it is the Queen herself as sovereign with whom the law deals, not the government on whose behalf her name and powers are used. If it were otherwise the government would not have her incidental prerogatives, which are personal to her, at its disposal.

> It is essential that the courts be available as guardians of Charter rights for those excluded groups that need it the most. Our proposal is that section 15 should be available for substantive equality claims by disadvantaged groups, and that members of advantaged groups who are disadvantaged only by virtue of their individual circumstances ought not to be able to bring substantive equality claims. This is based on three considerations:
>
> - members of advantaged groups are by definition not substantively disadvantaged;
> - the democratic process is more accessible to members of advantaged groups; and
> - the resources of both disadvantaged groups and the courts are limited.
>
> This would not mean that members of advantaged groups would be completely without equality rights, however. The process rights component of section 15 should be recognized and available to all. But it should be developed in a limited way to protect rights traditionally associated with the rule of law, such as access to the courts.[301]

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[301] G. Brodsky and S. Day Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back? 197 (1989).

Professor Gibson disagrees. He has expressed the view that it would be better to "dispose" of that "unhelpful expression."[302] He is of the opinion that under the limitations of a "discrete and insular minority" test, "the promise of section 15 would be cruelly crushed."[303]

One can sympathize with the desire of distinct and insular minorities to have their concerns "receive very serious considerations."[304] However, the premise underlying the "discrete and insular minority" test is not valid.[305] It is not analytically necessary to take away rights from one group in order to guarantee rights to another. Two wrongs do not make a right. It is possible and desirable to provide the equal benefit of the guarantee of "equal benefit of the law."

There are several other reasons for rejecting the identification of discrete and insular minorities as an aid to the interpretation and application of section 15 of the Charter. First, the phrase is apt to be misused by judges to avoid their responsibility to seriously analyze discrimination under section 1 of the Charter. Second, the scope of section 15 is narrowed rather than broadened by reference to that phrase. This is inconsistent with the generous approach to Charter interpretation articulated by the Supreme Court of Canada.[306] Third, the identification of a minority as "discrete and insular" will not aid in achieving the purpose of section 15, the prevention of discrimination by government. Fourth, as highlighted by Professor Gibson, the phrase is misleading in the use of the term "minorities": " 'Minorities' is misleading, since if applied to sex discrimination it would restrict Charter protection to males, who are less numerous than females in Canada."[307]

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[302] D. Gibson The Law of the Charter: Equality Rights 150 (1989).

[303] D. Gibson The Law of the Charter: Equality Rights 152 (1989).

[304] G. Brodsky and S. Day Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back? 197 (1989).

[305] D. Gibson The Law of the Charter: Equality Rights 150-52 (1989).

Justice Wilson's comments in The Queen v. Turpin[308] may serve to alleviate some of the concern that the phrase will be used to narrow the application of section 15. After noting that persons accused of one of the crimes listed in section 427 of the Criminal Code in all provinces except Alberta were not a "discrete and insular minority," Justice Wilson went on to say:

> I hasten to add that this categorization is not an end in itself but merely one of the analytical tools which are of assistance in determining

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[306] See The Queen v. Big M Drug Mart, [1985] 1 S.C.R. at 344. Contra Wentzell "The Charter Equality Guarantee and the Crown Priority" 35 Can. Tax Cas. 416, 419 (1987) ("If the equality rights are to retain their integrity, the types of distinctions that are characterized as prohibited discrimination must be examined carefully and expanded only cautiously.").

[307] D. Gibson The Law of the Charter: Equality Rights 159 (1989).

[308] [1989] 1 S.C.R. at 1333.

> whether the interest advanced by a particular claimant is the kind of interest s. 15 of the *Charter* is designed to protect.[309]

Notwithstanding this concession, Justice Wilson's reliance on the phrase in the context of section 15 is open to criticism. A focus on discrete and insular minorities under section 15(1) would be analytically inconsistent with section 15 of the Charter. If section 15(1) was intended to only operate in favour of minorities then section 15(2) would be redundant. Any law which benefitted minorities would be unlikely to violate section 15(1), particularly if the purpose of such law was to ameliorate conditions of disadvantage. Section 15(2) clearly suggests that discrimination in favour of an individual or group, whether a minority or majority, is precluded by section 15(1) unless it has as a purpose the amelioration of conditions of disadvantage suffered by that minority or majority. Section 15(1) proscribes "discrimination against *anyone*, high or low, majority or minority, influential or voiceless."[310]

The identification of discrete and insular minorities will only be useful for the purpose of determining whether a particular ground of discrimination is within the scope of section 15. It will not be helpful for the purpose of deciding who may or may not seek the protection of section 15. Justice

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[309] [1989] 1 S.C.R. at 1333.

[310] D. Gibson The Law of the Charter: Equality Rights 153 & n. 169a (1990). Professor Gibson cited the remarks of Justice Powell in Regents of University of California v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750 (1978) in support of this statement.

Powell, in Regents of University of California v. Bakke,[311] thought that this was the proper approach under the equal protection clause of the United States Constitution:

> [P]etitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. Carolene Products Co., supra, at 152-153, n 4, 82 L Ed 1234, 58 S Ct 778. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. See, e.g., Skinner v. Oklahoma ex rel. Williamson, 316 US 535, 541, 86 L Ed 1655, 62 S Ct 1110 (1942); Carrington v. Rash, 380 US 89, 94-97, 13 L Ed 2d 675, 85 S Ct 775 (1965). These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classification survives close examination. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 US 307, 313, 49 L Ed 2d 520, 96 S Ct 2562 (1976) (age); San Antonio Independent School Dist. v. Rodriguez, 411 US 1, 28, 36 L Ed 2d 16, 93 S Ct 1278 (1973) (wealth); Graham v. Richardson, 403 US 365, 272, 29 L Ed 2d 534, 91 S Ct 1848 (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:
>
> > "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi, 320 US, at 100, 87 L Ed 1774, 63 S Ct 1375.
> >
> > "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must

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[311] 438 U.S. 265, 57 L.Ed. 2d 750.

> subject them to the most rigid scrutiny." Korematsu, 323 US, at 216, 89 L Ed 194, 65 S Ct 193.
>
> The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.[312]

Once it is determined that there is an adverse distinction based upon a type of discrimination section 15(1) was intended to prevent, it matters not that the party discriminated against is in the majority for the purposes of that particular ground of discrimination. The Lord's Day Act struck down in The Queen v. Big M Drug Mart[313] would not have been any more acceptable in Canadian society if that law had mandated the observance of the day of rest of a minority, Saturday, rather than that of the majority, Sunday.

The Crown prerogative of priority discriminates in favour of a minority but does not have as a purpose the amelioration of conditions of disadvantage suffered by that minority and is, therefore, precluded by section 15(1) of the Charter.

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[312] 57 L. Ed. 2d at 771.

[313] [1985] 1 S.C.R. 295.

iv. The Queen v. Big M Drug Mart

The circumstances surrounding the constitutional adjudication of the validity of the Crown prerogative of priority are analogous to the circumstances surrounding the successful constitutional challenge to the federal Lord's Day Act in The Queen v. Big M Drug Mart.[314] In Big M Drug Mart Justice Dickson held unconstitutional a federal Sunday-closing law because the purpose of the law was inconsistent with the Charter. He made it abundantly clear, however, that his ruling did not mean that the government could not legislate in the area.[315] Legislatures may legislate Sunday closing provided the purpose is constitutional. The prerogative of priority is unconstitutional because the purpose is inconsistent with section 15 of the Charter. Nevertheless, the government may give to the Queen as representative of the executive a priority in the collection of Crown debts provided the purpose of such priority is a proper one under the Charter.

e. The Effect of the Prerogative of Priority is Discriminatory

If a court is satisfied that a law has an unconstitutional purpose, the court need not go on to consider whether the effects of the law are unconstitutional.[316] Such an exercise will usually be redundant. In The Queen

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[314] [1985] 1 S.C.R. at 350-51.

[315] [1985] 1 S.C.R. at 351.

[316] The Queen v. Big M Drug Mart, [1985] 1 S.C.R. at 331-32.

v. Big M Drug Mart Justice Dickson said that he "would find it difficult to conceive of legislation with an unconstitutional purpose, where the effects would not also be unconstitutional."[317] The effect of the Crown priority is to deny creditors of Crown debtors equality before and under the law and to deny them the equal protection and benefit of the law as guaranteed in section 15 of the Charter.

The discrimination inherent in the Crown prerogative is in substance no different than the discrimination at issue in Andrews v. Law Society of British Columbia:

> [A] rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class. ... [I]t discriminates against them on the ground of their personal characteristics, i.e., their non-citizen status.[318]

The prerogative of priority is a common law rule which bars an entire class of persons (subjects of the Crown) from the right to enforce their claims against a Crown debtor, solely on the grounds of the circumstances of their status in society. It discriminates against them on the basis of their personal characteristics, their non-royal status (they were not born into the family of the

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[317] [1985] 1 S.C.R. at 333.

[318] [1989] 1 S.C.R. at 151.

King or Queen).[319] The evils of discrimination based on status are vividly illustrated by the caste system in India, a system very similar to that which existed in medieval England. The destructive nature of the caste system is apparent from the following Reuter news service report published in The Edmonton Journal on June 29, 1990:

> A low-caste bridegroom from India's Taj Mahal town of Agra wanted to ride to his wedding on horseback, and that led to seven people dying and 50 being reported missing, a local member of parliament said Thursday.
>
> Police in Agra, 200 km south of Delhi, said they had arrested 200 people and were keeping four ghettos for Harijans -- the untouchables at the bottom of the Hindu caste hierarchy -- under curfew after the wedding sparked a caste war.
>
> "It's not the first time," said Ramji Lal Suman, a Harijan member of parliament for the area. "It's always happening."
>
> "The Jats (the caste of small landowners) thought it would lower their dignity. They think a Scheduled Caste (Harijan) person riding on a horse is getting above his station."
>
> Bridegroom Ram Deen, 15, eventually rode to nearby Panwari village in a police jeep to marry 13-year-old Mundra.[320]

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[319] See The Act of Succession (1700) 12 & 13 William III, c. 2 ("the crown and regal government of the said kingdoms of England, France and Ireland and of the dominions thereunto belonging with the royal state and dignity of the said realms and all honours stiles titles regalities prerogatives powers jurisdictions and authorities to the same belonging and appertaining shall be remain and continue to the said most excellent Sophia and the heirs of her body being protestants"). The same discrimination would exist if a priority were enacted in favour of Prime Minister Mulroney, his children and their descendants.

[320] "Bridegroom's ride spurs deadly caste battle in India" The Edmonton Journal June 29, 1990 at D15.

The discrimination between royalty and commoner inherent in the incidental prerogatives is similar to the discrimination held to be unconstitutional in Glowezeski v. Canada.[321] In Glowczeski Justice Muldoon of the Federal Court, Trial Division, held that denial of bail based on military rank was inconsistent with section 15 equality rights. Under the Queen's Regulations and Orders bail is allowed for warrant officers and commissioned officers. However, no provision is made in the Queen's Regulations and Orders for bail for members of the military up to and including sergeant. Justice Muldoon was of the opinion that such discrimination between classes could not withstand scrutiny under section 15:

> [B]y denying bail, in effect, [to] members of rank up to and including sergeant, but in making provision for bail after conviction for warrant officers and commissioned officers, the very system of military discipline, in this aspect, violates s. 15(1) of the Charter. The Supreme Court of Canada held in *Andrews v. Law Society of British Columbia* ... that a:
>
> > ... rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status ... would ... infringe s. 15 equality rights.
>
> So is a regime which bars an entire class of military and naval personnel from the right to reasonable bail after conviction, pending appeal or judicial review, while according such right to another class of personnel even though both have been convicted of offenses under the *National Defense Act* and/or the *Q.R. & O.*[322]

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[321] 41 C.R.R. 217 (F.C.T.D. 1989).

[322] 41 C.R.R. at 222-23.

B. PRELIMINARY VIEWS ON THE CONSTITUTIONAL VALIDITY OF THE CROWN PREROGATIVE OF PRIORITY

A number of judges have commented on the validity of the prerogative priority of the Crown in light of the Canadian Bill of Rights and the Charter. The majority have held that the prerogative priority is not affected by the Bill of Rights or the Charter. However, it is clear from their judgments that the issue was not fully argued before them. They did not have the benefit of an historical analysis of the Crown priority and their judgments were rendered prior to the release of any of the Supreme Court of Canada decisions on section 15 of the Charter.

In Gandy & Allison v. Erectors and Constructors[323] Justice Keirstead of the New Brunswick County Court was of "the opinion that the provisions of the *Bill of Rights* do not repeal or alter the prerogative right of the Crown to preference in payment." He rejected the argument that "something is being claimed for the Crown higher than the justice which is distributed among subjects of the Crown, and that this is repugnant to the doctrine and principle involved in the *Bill of Rights*."[324] Justice Keirstead's decision is of little precedential value as he offered no legal justification or reasoning in support of his conclusion that the Crown prerogative was not in conflict with the Canadian

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[323] 43 D.L.R. 2d 461, 472 (N.B. Co. Ct. 1963).

[324] 43 D.L.R. 2d at 472.

Bill of Rights. In any case, Bill of Rights case law will be largely irrelevant for the purposes of the guarantee of equality set forth in the Charter. In The Queen v. Turpin[325] Justice Wilson refused to import into the Charter the reasoning followed by the Supreme Court of Canada in connection with the guarantee of equality found in the Bill of Rights. She said that: "The guarantee of equality before the law must be interpreted in its *Charter* context which may involve entirely different considerations from the comparable provision in the *Canadian Bill of Rights*."[326] She was also of the view that analysis in Bill of Rights cases would not be very useful in Charter cases because of "The existence of s. 1 of the *Charter* and the demands it places on the state to justify limitation on rights[,] a distinctive feature of the *Charter* not found in the *Canadian Bill of Rights*."[327]

The prerogative priority has been challenged on the basis of section 15 of the Charter in at least two different legal actions. The first was Wright v. Canada.[328] In that case, Ontario District Court Judge Killeen held that the prerogative priority was inconsistent with section 15 of the Charter. He declared that the claim of the Crown for priority was of no force or effect.

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[325] [1989] 1 S.C.R. at 1326.

[326] [1989] 1 S.C.R. at 1326.

[327] [1989] 1 S.C.R. at 1326.

[328] [1986] 2 C.T.C. 409 (Ont. D.C. 1986).

Justice Killeen did not think that the use of the word "individual" in section 15 excluded the Crown from the reach of that section. He said:

> [S]urely a purposive and liberal interpretation of the section does not lead to the necessary conclusion that the Crown -- whether federal or provincial -- is not bound by the burdens of the section when the Crown law or action collides with an individual's rights under the section. The answer, I would have thought to the seeming conundrum is provided by section 32 of the Charter ... .
>
> This section provides that the Charter -- all of the Charter -- applies, *inter alia*, to both federal and provincial governments.[329]

After concluding that the Crown priority violated section 15, Justice Killeen went on to consider whether the prerogative was nonetheless justified under section 1 of the Charter. In considering the effect of section 1, he applied the criteria set forth in The Queen v. Oakes. After reviewing the test described by Chief Justice Dickson in that case, he concluded as follows:

> In applying these criteria to the instant case, I note, preliminarily, that Crown counsel elected to tender no socio-economic evidence before me to demonstrate that the objective of the Crown priority related to concern of a "pressing and substantial" character. Mr. Vita simply based his position on logical argumentation and reasoning that the priority buttressed the integrity of the federal tax-collecting procedures and was in the public interest.
>
> To me, the Crown argument smacks of an invitation to accept the Crown priority as an act of faith. It must be remembered, I believe, that the doctrine of Crown prerogative developed in a feudal society

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[329] [1986] 2 C.T.C. at 416.

> when the King was monarch in fact as well as theory. While the doctrine was carried over into later eras when constitutionalism and democratic government displaced a pure monarchial system, I cannot conclude that an ancient doctrine, or any of its aspects, can be any longer justified against the commands of the Charter by reference to a vague argument that the integrity of our federal tax-collecting system is vitally at stake. In support of arguments like that I would like to see some concrete evidence showing the past importance of the Crown priority within the tax-collecting structure of the federal government and, as well, why, in the current era, the federal government could not enact more narrowly tailored and less intrusive statutory provisions which could achieve the same objective as the Crown priority but which would be much more rational, less arbitrary and infinitely fairer.
>
> In short, I am unpersuaded on Mr. Vita's argument that the Crown priority raises a legitimate state concern of the "pressing and substantial" kind delineated under Chief Justice Dickson's first criterion.
>
> Equally, I conclude that it cannot meet the rigorous demands within the three-aspect second criterion. The Crown prerogative, and its priority component, can hardly be called a "carefully designed" measure. It is rather, a common-law rule which flowed from the autocratic powers of the monarchy. Even assuming, *arguendo* that this priority claim is rationally related to the objective identified by the Crown, it clearly is not crafted to impair "as little as possible" the right or freedom in question. And, finally, I see no proportionality between the "effects" of the priority and the alleged "sufficiently important" objective.[330]

The Crown appealed Justice Killeen's decision to the Divisional Court of Ontario. However, before the decision of the Divisional Court of Ontario was released in December 1987, the Federal Court, Trial Division, released a decision in January 1987 upholding the Crown prerogative. In Lennox

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[330] [1986] 2 C.T.C. at 418-19.

Industries (Canada) v. The Queen[331] Justice Reed refused to declare the prerogative priority invalid under section 15 of the Charter:

> I cannot classify the Crown as being similarly situated to the plaintiff. I do not think the Crown's priority claim in this case is a distinction or inequality to which section 15 was meant to apply. The situation might be different if the Crown were operating in a commercial or trade capacity and had incurred the debts on the same basis as the private citizen. But in the collection of income tax the Crown is not acting as a private person would, it is acting in its governmental capacity.[332]

If it were true that the Queen is not acting as a private person when she collects income tax by way of writ of execution then the comments of Justice Reed would no doubt be justified on the basis of the principle set forth by Justice Cory in Rudolph Wolff & Co. v. Canada.[333] However, the Queen as debtor is in the same position as a private individual and in fact acts as a private person would. The Queen must rely upon a writ of execution (whether writ of *fieri fascias* or *extendi fascias* is of no consequence) to collect all debts (tax, commercial or otherwise) owing to her. A priority in favour of the Queen could only escape scrutiny under section 15 of the Charter if the tax legislation itself granted the Queen a right of priority in execution because of the Queen's status as government tax collector.[334] The Queen may not argue that a law with an unconstitutional purpose is nevertheless constitutional because there is now a constitutional purpose for its continued existence.[335] The Queen may not legitimize her unconstitutional nongovernmental powers by using them for governmental purposes.

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[331] [1987] 1 C.T.C. 171 (F.C.T.D.). See also Montreal Trust Company v. Tottrup, No. 8503-23830 (Alta. Q.B. Aug. 21, 1990) (in both imposition and collection of taxes Crown is acting governmentally).

[332] [1987] 1 C.T.C. at 174.

[333] Justice Cooke adopted just this position in Montreal Trust Company v. Tottrup, No. 8503-23830, at 33-34 (Alta. Q.B. Aug. 21, 1990).

The Ontario Divisional Court reversed the decision of Justice Killeen in Wright v. Canada.[336] Writing on behalf of the majority, Justice Austin allowed the appeal because "the learned judge ... erred in concluding that the Crown was an 'individual' for the purposes of section 15 of the Charter."[337] The trial judge did not, however, base his decision on the proposition that the Crown was an "individual", though such a conclusion is not unsupportable. The decision was instead based on section 32 of the Charter which subjects the Crown to all of the Charter, including section 15.[338]

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[334] *Contra* Montreal Trust Company v. Tottrup, No. 8503-23830, at 33-34 (Alta. Q.B. Aug. 21, 1990) (Crown acting in governmental capacity when collecting taxes through use of writ of execution).

[335] The Queen v. Big M Drug Mart, [1985] 1 S.C.R. at 353 (Lord's Day Act passed for unconstitutional religious purpose and not justified on the basis of current potential secular purpose).

[336] Wright v. Canada, [1988] 1 C.T.C. 107 (Ont. Div. Ct. 1987).

[337] [1988] 1 C.T.C. at 109.

[338] [1986] 2 C.T.C. at 416.

Justice Austin's reasoning on this point has been subject to harsh criticism by legal commentators. Professor Gibson has written:

> Reference should be made, however, to an odd line of cases that appears to have confused the question of who is *bound* by section 15 with that of who is *protected* by the section. In *Wright v. Canada (Attorney General)* for example, a claim *against* the Crown, attacking the Crown's prerogative priority among creditors as a contravention of section 15(1) of the Charter, was dismissed on the ground that the Crown is not "an individual", and is accordingly not affected by equality rights under the Charter. This seems clearly mistaken, since the question of whether the Crown is an "individual" would only be relevant vis-à-vis section 15(1) if the Crown were claiming *protection* of the Charter. The Crown's *obligations* under the Charter are determined by section 32(1), which subjects all "government" (of which the Crown is unquestionably a part) to Charter control.[339]

C. PRIORITY OF THE CROWN NOT JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY

1. Section 1 Queries

A determination that a law is inconsistent with a right or freedom guaranteed by section 1 of the Charter obliges the defender of the legislation to prove on a balance of probabilities that it represents a "reasonable limit ... in a free and democratic society."[340] The standard will be applied rigorously[341] "[h]aving regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect."[342] This evidentiary burden is "attributable in part to [courts'] reluctance to conclude that society must be prepared to condone and live with legislation which in its application breaches a fundamental right."[343]

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[339] D. Gibson The Law of the Charter: Equality Rights 55-56 (1989).

[340] The Queen v. Oakes, [1986] 1 S.C.R. at 136-37.

[341] [1986] 1 S.C.R. at 137.

The Queen v. Oakes[344] sets out the questions which must be answered in order to apply the constitutional measure which section 1 represents. They are as follows: 1. What is the objective of the challenged law? 2. Is the law a response to pressing and substantial concerns which are important enough to justify contravention of a Charter protected right or freedom? 3. Do the law's means rationally promote the attainment of the objective? 4. Do the means impair the infringed right of freedom as little as possible? 5. Is the deleterious impact of the law on those whose rights or freedoms are infringed greater than the ameliorative values associated with the objective the law was designed to achieve?[345] The Supreme Court of Canada has recently confirmed that the Oakes analysis of section 1 is equally applicable in the context of violations of section 15 of the Charter.[346]

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[342] [1986] 1 S.C.R. at 138.

[343] Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings, [1987] 5 W.W.R. 577, 633 (Sask. C.A.).

[344] [1986] 1 S.C.R. at 138-40.

[345] [1986] 1 S.C.R. at 138-40.

[346] Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. at 154.

The Supreme Court of Canada has identified two further factors which must be taken into consideration under the section 1 analysis. First, it is the original purpose of the law which must be justified. The American concept of shifting purpose has been rejected in Canada.[347] Second, it is the original justification advanced by the Crown which must be considered. The American approach of accepting any reasonably conceivable justification is not consistent with the approach of the Supreme Court of Canada. In Reference re Public Service Employee Relations Act[348] Chief Justice Dickson declined to supplement the list of claimed reasons which prompted government to pass the impugned legislation.

2. Application to the Crown Prerogative of Priority

The original medieval justification of *detur digniori*, or "let it be given to the worthier," is no longer a valid rational for a rule which treats the Crown more favourably than the subjects of the Crown, the citizens of Canada. "There is no reason to retain outmoded, inegalitarian, status-bound concepts of the Crown and her prerogatives and privileges."[349] The Crown priority was originally justified on the basis that it was not consistent with the dignity of the

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[347] The Queen v. Big M Drug Mart, [1985] 1 S.C.R. at 334-36.

[348] [1987] 1 S.C.R. 313, 374.

[349] Cohen "Thinking About the State: Law Reform and the Crown in Canada" 24 Osgoode Hall L.J. 379, 386 (1987).

Crown to share with a subject.[350] The nature of the prerogative's medieval origins lead the Law Reform Commission of British Columbia to recommend that the Crown priority be abandoned as an operative principle in the conduct of government.[351]

According to the Supreme Court of Canada in The Queen v. Big M Drug Mart[352] it is the original purpose of the law which must be justified under section 1 of the Charter. The House of Lords applied a similar principle in McKendrick v. Sinclair.[353] In discussing the revival of a dormant common law rule, Lord Simon of Glaisdale said "that if a rule is revived, it must be taken with all its incidents, however outmoded - you cannot pick and choose among them."[354] The Crown must establish that both the purpose and the effect of the prerogative priority are justified in a free and democratic society. The Crown cannot take advantage of the effect of a common law rule without first establishing that the original purpose of the rule is constitutional.

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[350] H. Broom Legal Maxims 55-58 (8th ed. 1911).

[351] Law Reform Commission of British Columbia Report on The Crown as Creditor: Priorities and Privileges 39 (1982) (hereinafter cited as "B.C. Law Reform Report"). See also Wright v. Canada, [1986] 2 C.T.C. at 419.

[352] [1985] 1 S.C.R. at 334-6.

[353] [1972] S.L.T. 110, 117 (H.L.).

[354] [1972] S.L.T. at 117.

The Irish courts have been the only courts to seriously consider the original purpose of the Crown prerogative of priority. In Re Irish Employers Mutual Insurance Association[355] Justice Kingsmill Moore of the High Court of Ireland reviewed an earlier decision of Justice Gavan Duffy in Re P.C., an Arranging Debtor[356] wherein Justice Gavan Duffy concluded that:

> The common law prerogative of prior payment of his debts belonged to the king, not because he was the supreme executive authority, but because of the personal pre-eminence over all subjects which attached to him at common law, on the principle expressed in the phrase "*detur digniori*."[357]

Justice Kingsmill Moore adopted this explanation of the original purpose of the prerogative priority after carefully reviewing British constitutional history so as to independently satisfy himself as to the validity of the statement. Justice Kingsmill Moore explained the reason for his extensive research into the origin of the prerogative:

> Although the decision of a co-ordinate Court is not binding I would be very slow to defer from a considered view of the late President, who is so deeply versed in the constitutional law of Great Britain and the Commonwealth, and who had himself taken such a prominent part in our own constitutional development. His view was based on broad propositions which were to him so manifest as not to need justification

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[355] [1955] I.R. 176.

[356] [1939] I.R. 306.

[357] Re Irish Employers Mutual Insurance Association, [1955] I.R. at 199.

> by any elaborate citation of authority. To me those propositions did not appear so self-evident and, accordingly, in an attempt to satisfy myself of their validity, I have been driven to make some researches into history and constitutional law and practice. The result has been to convince me of the correctness of the President's proposition and it would be sufficient to leave the matter there, but, as the subject is not fully dealt with in any text-book, and as this case is most certain to go further, I have endeavored to summarize the investigations which convinced me of the correctness of the President's decision and which lead into regions not often explored by modern practicing lawyers.[358]

As a result of his research, Justice Kingsmill Moore concluded that the Crown prerogative of priority was originally justified on the basis of the feudal concept of inequality among persons:

> 1, The prerogative originated in a period when modern conceptions of the nature of sovereignty and government had not yet arisen. The structure of society was still feudal; property law was built on a feudal skeleton; loyalty was an essentially personal matter; the king was looked on more as a feudal overlord than as the embodiment of national power and aspiration; and the royal revenues, feudal by nature, were regarded as the king's personal possession, which could be spent by him according to his personal desires and without restriction by ministerial or parliamentary interference.
>
> 2, When it was sought eventually to find a legal principle on which to base this prerogative the principle was derived from cases which were concerned with feudal incidents and the feudal law of property.[359]

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[358] [1955] I.R. at 198.

[359] Re Irish Employers Mutual Insurance Association, [1955] I.R. at 215.

Justice Kingsmill Moore referred to the 1691 decision of Woodward v. Fox[360] in his review of the law. In that case the court identified the legal theory behind the preference in favour of the Crown: "[I]f the right lies equal between the King and subject the King's title hath the preference by law, *detur digniori* is a rule, 9 Co. 24, in case of concurrence of titles, between the King and subject."[361] The prerogative of the Crown cannot be justified under section 1 on the basis of giving way to the "worthier." The medieval political system and social structure has long been abandoned. Section 15 of the Charter now requires that this vestige of that society also be left behind.

The fact that Canada is a democracy rather than a fiefdom is no reason to exclude the incidental prerogatives of the Crown from the requirements of section 15 of the Charter. Holdsworth was of the view that the threat of the tyranny of the majority was a good reason for limiting rather than giving full reign to the Crown prerogative:

> [T]he law as to the Crown's remedies against the subject needs to be brought up to date; and the need is the more urgent by reason of the increased powers which the Legislature is in the habit of giving to the Crown and its servants; for many of these powers can be enforced by these drastic prerogative remedies, in the employment of which the Crown still has very many of its old procedural and pleading privileges. Moreover, the survival of these procedural and pleading privileges is at the present day far more dangerous to individual liberty than at any

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[360] 2 Ventris 267, 268 (1691).

[361] Re Irish Employers Mutual Insurance Association, [1955] I.R. at 207.

> other period, because they are at the disposal of a democratic government -- a form of government which Burke, with some reason, said was the most shameless and fearless thing in the world, and more oppressive than any other form of government to a minority; for, while Kings or aristocracies were always more or less conscious of the fact that they must conciliate public opinion by a moderate use of their powers, the majority in a democratic state, however small it is, always imagines that it voices public opinion, and so can act as it pleases without further reflection.[362]

The Charter, and section 15 in particular, was enacted for the very purpose of protecting minorities from the tyranny of the majority.[363]

Over the centuries, different theories have been suggested as justifications for the priority given to the Crown. Courts and commentators in the seventeenth century were particularly active in creating justifications for the Crown's unusual privilege.

Justice Kingsmill Moore reviewed these justifications in Re Irish Employers Mutual Insurance Association Limited.[364] He came to the conclusion that they did not explain the origins of the prerogative of priority but did account for its continued existence:

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[362] 10 W. Holdsworth A History of English Law 346-47 (3rd ed. 1923).

[363] Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. at 152 (section 15 intended to protect interests of "those groups in society whose needs and wishes elected officials have no apparent interest in attending").

[364] [1955] I.R. at 208-11.

> It remains to consider the third class of authorities bearing on this prerogative, those in which some attempt is given to provide reasons for its existence. The reasons suggested, if they are meant to provide an explanation of its origin can hardly be taken seriously; but, as explanations why the prerogative continued to exist, and escaped questioning or attack, they probably reflect with some accuracy the changing political thought and theory of the times when they were expressed.[365]

Justice Kingsmill Moore identified two of the major reasons advanced to explain why the prerogative of priority was "allowed to exist" through the centuries. The first justification was that the Queen was intended to be busy about the public good and should not have to worry about what her agents were doing to collect debts owing to her. A number of latin maxims have been coined to represent this proposition: *thesaurus regis est vinculum pacis et bellorum nerui, ardua regni pro bono publico* and *firmamentum belli et ornamentum pacis*.[366] Justice Kingsmill Moore was not impressed by these high sounding latin phrases:

> Those reasons reflect a growing feeling that such an exceptional class of privileges requires some justification and some reconcilement with the public interest. They are clearly fictitious as explanations of the origin of the privilege, though they may serve as excuses for its retention.[367]

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[365] [1955] I.R. at 208.

[366] [1955] I.R. at 209.

[367] [1955] I.R. at 209.

The second reason was explained in Giles v. Grover:

> In *Giles v. Grover*, Alderson J., after adopting the argument that the king is so occupied in public business as not to be able to take care of every private matter relating to his revenue, gives as a second reason "that by the King is in reality to be understood the nation at large, to whose interest that of any private individual ought to give way" and refers to Coke's maxim as a representation of this viewpoint. To the same purposes is the language of Lord MacNaghten in *New South Wales Taxation Commissioners v. Palmer*, where, referring to the prerogative of priority, he says it is "perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community.[368]

Justice Kingsmill Moore concluded that these explanations did not illuminate the origin of the prerogative of priority:

> The various dicta to which I have referred seem to me partially an expression of political outlook, partially a statement of constitutional reality at the time when they were uttered. They cast no light on the origin of the prerogative or as to its strict legal nature, but they do account for its survival, hardly restricted by the legislature, on the ground that, in the hands of the executive it serves a purpose advantageous to the community.[369]

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[368] [1955] I.R. at 210.

[369] [1955] I.R. at 210-11.

While the courts in Ireland have rejected the prerogative of priority as part of the common law in force in that country,[370] courts in the United States have come to the opposite conclusion, holding that the Crown priority was received into the laws of individual states as part of the common law of England.[371] These differing conclusions can be explained by the divergent understandings of the basis for the prerogative priority. The United States courts defined the prerogative of priority as "an incident to sovereignty, and not as a personal right attaching to the king's person."[372] Justice Story of the United States Supreme Court wrote in an 1832 opinion that the Crown priority of payment of debts was "founded not so much upon any personal advantage to the sovereign as upon motives of public policy in order to secure an adequate revenue to sustain the public burdens and discharge the public debts."[373]

As noted previously, the Irish courts came to the opposite conclusion:

> The Common law prerogative of prior payment of his debts belonged to the king, not because he was the supreme executive authority, but because of the personal pre-eminence over all subjects which attached to

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[370] Re Irish Employers Mutual Insurance Association, [1955] I.R. at 240-41.

[371] State v. Bank of Maryland, 6 G. & J. 205, 225-28 (Maryland 1834); State v. Foster, 38 P. 926, 928 (Wyoming 1895).

[372] State v. Foster, 38 P. at 928.

[373] United States v. State Bank of North Carolina, 8 L. Ed. 308, 310 (U.S.S.C. 1832).

> him at common law, on the principle expressed in the phrase "*detur digniori*".[374]

The Supreme Court of Ireland was of the view that the prerogative of priority was inconsistent with the Constitution of Ireland and, therefore, was not received into the laws of Ireland as part of the common law in force prior to the new Irish Constitution.[375] In coming to this conclusion the Supreme Court of Ireland relied on a clause in the Constitution of Ireland which adopted the former common law "to the extent to which [it was] not inconsistent" with the Constitution.[376] Interestingly, a similar clause in the Constitution of the State of Maryland did not lead the courts in that state to reject the Crown prerogative of priority.[377]

The legislative committees and commissions from various Commonwealth nations which have studied the issue have identified three reasons usually advanced today to justify the Crown priority:

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[374] Re Irish Employers Mutual Insurance Association, [1955] I.R. at 199.

[375] Re Irish Employers Mutual Insurance Association, [1955] I.R. at 240-41.

[376] Re Irish Employers Mutual Insurance Association, [1955] I.R. at 240-41.

[377] State v. Bank of Maryland, 6 G & J. at 226 (common law adopted by Bill of Rights, "so far at least as it was not inconsistent with the principles of that instrument, and the nature of our political institution").

i) the Queen is not able to choose her debtors, particularly in regard to taxation;

ii) the necessity to protect the reserves of the Crown and thereby maintain the financial stability of the government;

iii) the general good of the community should prevail over the good of one member thereof.[378]

Although some of the concerns identified may be pressing and substantial under certain circumstances, there is no longer a rational connection between the priority of the Crown and the reasons advanced for its continued existence.[379] In connection with the argument that the Queen is not able to choose her debtors the Australian Senate Committee noted that:

> While it is apparent that these reasons were once valid, it is clear that they no longer have the same force. It is still true that, as regards taxation debts, the Crown is not a voluntary creditor. However, the Crown is not peculiar in this. Individuals who have been awarded damages against an insolvent individual or company are also seeking repayment of debts which they had not willingly permitted to be incurred.[380]

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[378] Australian Senate Report at 6-7; B.C. Law Reform Report at 35-36; Canadian Study Committee Report (1970) at 122-23; C. Dunlop Creditor - Debtor Law in Canada 449 (1981).

[379] See, however, Wright v. Canada, [1986] 2 C.T.C. at 419 where the only judge to have thus far addressed the section 1 issue in this context determined that the Crown had not established pressing and substantial concerns.

[380] Australian Senate Report 6. See also Shanker "The Worthier Creditors (and a Cheer for the King)" 1 Can. Bus. L.J. 340 (1975-76).

The Canadian Study Committee Report (1970) followed the same line of reasoning and asked: "[W]hether, in our economy of lazy credit, the businessman has always the economic freedom to choose his debtor or whether he is not bound, to a certain point, to give credit to the same extent as do his closest competitors."[381] The Canadian Study Committee similarly rejected the argument that the priority was necessary for the financial stability of the government.[382] The Australian Senate Committee concluded that: "With respect to the need to protect the revenues of the Crown, the position was clearly different when only a small section of the general public funded public expenditure."[383]

The Canadian Study Committee attacked the logic behind the third reason identified, noting that "it could even be argued that the government should rank after ordinary creditors, as the public treasury is, in fact, in a better position than anyone to bear the inevitable losses."[384] The committee was of the view that it would be more logical for the government to divide the burden of tax left unpaid among all the tax paying public "than to take advantage of the bankruptcy of an insolvent taxpayer to reimburse itself, at the expense of the creditors who have already suffered losses."[385] The committee concluded that "there can be no rational explanation for the government attempt to obtain payment of the tax due by a bankrupt from his creditors. Such a proposition offends one's sense of natural justice."[386] This view was shared by the House of Lords in Attorney General v. De Keyser's Royal Hotel: "[T]he feeling that it [is] equitable that burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals has grown to be a national sentiment."[387]

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[381] Canadian Study Committee Report (1970) at 123.

[382] Canadian Study Committee Report (1970) at 123.

[383] Australian Senate Report, 7.

[384] Canadian Study Committee Report (1970) at 123.

The Australian Senate Committee doubted whether the "Community as a whole would support the retention of this priority in its name at the expense of creditors who suffer the consequences of the winding-up much more directly."[388] The common law preference for Crown debts was also subject to strong criticism by Justice Murphy of the High Court of Australia in Bank of New

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[385] Canadian Study Committee Report (1970) at 123. See also Extract from the House of Commons Debates of 10th February 1969, 12 C.B.R. 117, 120 ("[T]he important principle is who can best afford to bear the loss, the small businessman or the vast resources of government? The answer is obvious.").

[386] Canadian Study Committee Report (1970) at 123.

[387] [1920] A.C. 508, 553. See also Report of the Advisory Committee on Bankruptcy and Insolvency Proposed Bankruptcy Act Amendments 79 (Canada 1986) (hereinafter cited as "Canadian Advisory Committee Report (1986)") ("The burden of tax left unpaid by the bankrupt should be divided among all the tax-paying public rather than borne by the creditors, who have already suffered loss").

[388] Australian Senate Report 8.

South Wales v. The Commissioner of Taxation.[389] In commenting on the "unjust operation of the common law," Justice Murphy referred to the report of the Australian Senate Committee and its recommendation that the Crown priority be abrogated.[390]

The Supreme Court of Canada has expressed similar doubts about the justification for privileges in favour of the Crown in modern society. In The Queen v. Eldorado Nuclear Ltd. Justice Dickson wrote:

> The more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject.[391]

A seven judge panel of the Court of Appeal of Alberta in Farm Credit Corporation v. Dunwoody[392] agreed: "that it has become 'less easy ... to understand why the Crown need be, or ought to be, in a position different from the subject.' "[393]

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[389] 54 A.L.J.R. 129, 134 (H.C. 1979).

[390] 54 A.L.J.R. at 134.

[391] [1983] 2 S.C.R. at 558.

[392] [1988] 5 W.W.R. 87 (Alta. C.A.).

[393] [1988] 5 W.W.R. at 94.

Justice Hugessen of the Federal Court of Appeal expressed strong views on this issue in C.I.A.C. v. The Queen:[394] "[T]his old notion of royal immunity cannot be reconciled with our modern understanding of a democratic state and of the right of every citizen to be equal before the law."

These expressions of disapproval for the Crown prerogative are not particularly new. Over 100 years ago Justice Patterson of the Supreme Court of Canada said the same thing in a discussion of "the general rule of English Law which gives the crown, when claiming as a creditor, priority over other creditors of equal degree."[395] He said:

> There may be practical force in the suggestion that the law would be more in consonance with the real life and spirit of the time if the public in the aggregate, nominally represented by the crown, and the public as individuals, were made to stand in this particular on the same footing.[396]

Unfortunately, until section 15 of the Charter came into force in 1985 judges were not equipped to modify the common law and tame the Crown prerogative of priority. Now that the prerogative priority is under the control of the Charter and the courts, all creditors may stand equal before the law.

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[394] [1984] 2 F.C. 866, 870-71 (C.A.).

[395] Maritime Bank v. The Queen, 17 S.C.R. 657, 684 (1889).

[396] Maritime Bank v. The Queen, 17 S.C.R. at 684. See also Law Reform Commission of Canada The Legal Status of the Federal Administration (Working Paper 40) 2 (1985) ("Today, the Crown continues to represent a legal reality endowed with many privileges, powers and immunities that are difficult to reconcile with the ideals of a society concerned about equality and democracy").

Finally, the deleterious impact of the Crown priority far outweighs any benefit it bestows upon society. The British Columbia Law Reform Commission identified four adverse effects of the Crown priority:

i) hardship for other creditors;
ii) inhibiting effect of the Crown's priority on other creditors;
iii) forbearance and its effect on apparent liquidity;
iv) uncertainty occasioned by exercise of discretionary powers.[397]

In its 1982 report criticizing the Crown priority the Scottish Law Commission cited the following passage from the opinion of Lord Anderson in Admiralty v. Blair's Trustee:

> In the case of *Palmer* Lord MacNaghten justifies the doctrine on the ground that its assertion results in the benefit of the general community (that is, the general body of taxpayers) although at the expense of the individual. I should have thought this was a reason for condemning the principle. Why should individuals be made to suffer for the general good, especially in a case like the

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[397] B.C. Law Reform Report 37-39.

> present, where the general benefit is infinitesimal but the individual loss substantial?[398]

The Australian Senate Committee was of the view that the Crown priority worked a great hardship upon those affected by it:

> By far the most important of these objections is the hardship which is experienced by creditors who have not been repaid debts owing to them because the remaining assets have been used to pay debts owing to the Crown. Many instances have been brought to the Committee's attention concerning the hardship which has been experienced by employees, small businessmen and creditors of varying means who have been severely disadvantaged by the existence of the Crown's priority.[399]

Parliamentarians from both sides of the Canadian House of Commons have also referred to the hardship created by the Crown priority.[400]

A further effect of the Crown priority is to inhibit the creditor from pursuing a claim where it is possible that the Crown will intervene to assert its priority and thus deprive the creditor of the fruits of the time and effort invested to pursue potential sources of reimbursement.[401] "The creditor does all the work and the revenuers move into reap the benefit."[402]

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[398] Scottish Law Commission Report on Bankruptcy and Related Aspects of Insolvency 217 (1982).

[399] Australian Senate Report 27.

[400] Extract from the House of Commons Debates of 10th February 1969, 12 C.B.R. 117.

The problem of forbearance and its effect on apparent liquidity was considered by the Law Reform Commission of British Columbia in its 1982 report on the Crown as creditor. The Commission favoured abolition of the Crown prerogative priority of first payment of debts because ordinary creditors have been severely prejudiced by the apparent liquidity occasioned by the Crown's action or, more accurately, lack thereof.[403] Even those who support the retention of the Crown priority believe it should not be given to the "lazy tax collector."[404]

The manner in which the Queen may exercise the priority provides another compelling reason for its abandonment. The Queen may decide not to insist upon her right to prior payment in certain cases. This ability to selectively assert the priority is in and of itself a violation of the rule of law and the principle of equal treatment. The Australian Senate Committee was of the firm opinion that "The situation should no longer be permitted to exist."[405]

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[401] B.C. Law Reform Report 38.

[402] Extract from the House of Commons Debates of 10th February 1969, 12 C.B.R. at 120.

[403] B.C. Law Reform Report 38-39.

[404] B.C. Law Reform Report 39.

The conclusion of each of the reports out of Australia, British Columbia, Scotland and Canada is that "the priority of the Crown in our modern society cannot be justified."[406]

D. CONCLUSION

Section 15 of the Charter proscribes discrimination on the basis of personal differences irrelevant to the purpose of a law. This includes irrelevant personal differences between the Queen and her subjects. The Supreme Court of Canada has indicated that discrimination on the basis of relevant personal differences between Queen and subject is not contrary to section 15 of the Charter. Therefore, an analysis of the purpose of the Crown priority is necessary. If the purpose of the prerogative priority had related to the Queen's position as head of state then no prima facie case of discrimination under section 15 could be established. The existence of relevant differences between Queen and subject would make comparison under section 15 improper. However, as the purpose of the prerogative priority relates to medieval concepts of the royal dignity of the person of the Queen, section 15 of the

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[405] Australian Senate Report 33.

[406] Canadian Study Committee Report (1970) at 123. See also Australian Senate Report 42 & 70; B.C. Law Reform Report 35 & 40; Canadian Advisory Committee Report (1986) 79.

Charter is implicated. Discrimination based on personal status in society is the type of discrimination the Charter, and section 15 in particular, is meant to remedy. Recognition or perpetuation of a class structure is inimical to the principles set forth in section 15 of the Charter.

The common law has given the Queen a prerogative priority in recognition of her royal person and not because of her position as chief executive officer of the government. If Parliament desires the Queen to have a priority as the representative of the executive arm of government, Parliament must legislate such priority and not rely on archaic theories inconsistent with modern principles of law.

In 1982 a second "Glorious Revolution" took place. The Charter was adopted by Parliament. Parliament, including the Queen, is now subject to a written constitution. Today, the Queen may only exercise the royal prerogative to the extent its purpose and effect is consistent with the Constitution of Canada. This should not cause the government concern. If a priority in favour of the Crown is thought important to a modern democratic government, it may be enacted for a proper purpose by Parliament.

The Crown prerogative of priority is not worth saving at the expense of the legal principles and moral values enshrined in the Charter. Under the

Constitution of Canada the Crown prerogative of priority is "legally unnecessary and morally inadequate. It is legally unnecessary because, in fact, no sovereignty, however conceived, is weakened by living the life of the law. It is morally inadequate because it exalts authority over justice."[407]

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[407] Laski "The Responsibility of the State in England" 147 L.T.J. 259, 298 (1919).

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The Queen v. Operation Dismantle, [1983] 1 F.C. 745 (C.A.), aff'd [1985] 1 S.C.R. 441.

The Queen v. Beauregard, [1986] 2 S.C.R. 56.

The Queen v. Big M Drug Mart, [1985] 1 S.C.R. 295.

The King v. Curtis, Parker 95 (1750).

The Queen v. Secretary of State, [1982] 2 All E.R. 118 (C.A.).

The Queen v. Bank of Nova Scotia, 11 S.C.R. 1 (1885).

United States v. State Bank of North Carolina, 8 L. Ed. 308 (U.S.S.C. 1832).

Woodward v. Fox, 2 Ventris 267 (1691).

Wright v. Central DuPage Hospital, 63 Ill. 2d 313, 347 N.E. 2d 736 (1976).

Wright v. Canada, [1986] 2 C.T.C. 409 (Ont. Dist. Ct.), aff'd [1988] 1 C.T.C. 107 (Div. Ct. 1987).

APPENDIX I

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July 4, 5, 11; Oct. 25; Nov. 2, 9, 17, 24; Dec. 1, 15.
1951.
April 26; Oct. 18.
Supreme Court.
1952.
Feb. 5, 6, 7, 8, 11, 12, 13, 14; April 21, 22.
1953.
July 3.

IN THE MATTER OF THE COMPANIES (CONSOLIDATION) ACT, 1908, AND IN THE MATTER OF THE IRISH EMPLOYERS MUTUAL INSURANCE ASSOCIATION LIMITED (IN LIQUIDATION).

Company—Winding up—Priority of payments—Right of Commissioners of Public Works—Mutual insurance association in liquidation—Claim by Commissioners of Public Works to payment in priority to other creditors—Preferential payments—Whether common law prerogative right of Crown to priority of payment applicable to sums payable for benefit of Central Fund—Rights of members of mutual association to priority inter se—Principles for ascertaining whether the Commissioners acting as agents of the State or as public servants—Finance Act, 1924 (No. 27 of 1924), s. 38—Preferential Payments in Bankruptcy (Ir.) Act, 1889 (52 and 53 Vict., c. 60), s. 4—Constitution of the Irish Free State (Saorstat Eireann) Act, 1922 (No. 1 of 1922)—Constitution of Ireland.

By order of the High Court, dated the 4th July, 1948, it was ordered that the Irish Employers Mutual Insurance Association Limited, a company limited by guarantee, and having no share capital, should be wound up compulsorily. The total claims of creditors anticipated to be valid amounted to £64,771 2s. 11d., of which £21,353 7s. 5d. was claimed by the Commissioners of Public Works on account of moneys which the Commissioners had been compelled to pay on foot of liabilities in respect of which they held insurance cover entitling them to indemnification by the Association. This sum was paid by the Commissioners from funds voted to them for the purpose by annual Appropriation Acts. In the course of the winding up, the Commissioners of Public Works claimed the amount due to them as payable in priority to the other creditors on the basis that they were entitled to statutory priority, or alternatively to priority of payment by virtue of the common law prerogative of priority accorded to Crown debts.

Held by Kingsmill Moore J. 1. That s. 38, sub-s. 2, of the Finance Act, 1924, provides no basis for the claim to the priority sought to be established by the Commissioners of Public Works.

2. The Commissioners of Public Works, though in general holding the status of servants of the State, may, in the execution of certain duties, act as servants of the public in which instance they are not entitled to the privileges and protections which may apply to servants of the State. (Principles to be followed in ascertaining whether the Commissioners of Public Works in the execution of their duty are to be considered as acting as servants of the State or as public servants considered.)

3. The common law prerogative of priority of payments of Crown debts which existed prior to the coming into operation of the Constitution of the Irish Free State (Saorstat Eireann) Act, 1922, does not apply to State debts. Origin and history of the prerogative of priority of Crown debts traced and considered. *In re P. C., an Arranging Debtor* [1939] I. R. 306 considered and approved.

On appeal by the Commissioners to the Supreme Court it was

Held by the Supreme Court (Maguire C.J., Murnaghan, O'Byrne and Lavery JJ.) 1. That s. 38, sub-s. 2, of the Finance Act, 1924, applies only to taxes and charges under the care of the Revenue Commissioners and provides no basis for a claim to priority of payment in respect of sums payable for the benefit of the Central Fund: *In re Irish Aero Club, Gillic v. Minister for Industry and Commerce* [1939] I. R. 304 affirmed.

2. That the structure of the State being no longer in conformity with the British pattern there is no room in the Constitution of the State for that part of the prerogative which gave priority of payment to Crown debts.

Per Lavery J. (O'Byrne J. concurring) 1. The Association being fully aware that, in entering into the contracts of insurance, the Commissioners of Public Works were contracting as agents for the appropriate Minister, it could not be said that such Minister had become a member of the Association under Article 7 of its Articles of Association, or that his position was affected by the relations between members of the Association arising from mutuality.

2. In entering into the contracts of insurance the Commissioners of Public Works contracted, as principals, with other members of the Association for their mutual protection and insurance and became members of the Association, and, the claim to priority by the Commissioners being wholly inconsistent with the mutuality which was the basis of the contract, such claim failed.

3. The provisions of the contract of insurance were binding on the Minister concerned whose claim would arise only under the contract and not otherwise.

MOTION FOR DIRECTIONS.

The Irish Employers Mutual Insurance Association Limited (hereinafter referred to as "the Company") had for one of its objects the carrying on of the business of insurers. It was a mutual company limited by guarantee and had no share capital. The Commissioners of Public Works in Ireland advertised for tenders for insurance against various types of employers' liability under which they were subject to claims in respect of workmen employed by them in different categories of public work assigned to the control of the Commissioners. A tender by the Company for this business for the year, 1937, was accepted, and a further agreement for similar insurance cover by the Company was entered into for the year commencing the 1st April, 1938. On the 4th July, 1938, an order for the compulsory winding up of the Company was made, and a liquidator was subsequently appointed. By reason of the winding up of the Company, the Commissioners of Public Works were compelled to meet a large number of claims by workmen for damages and compensation under various heads of liability in respect of which they would have been entitled to indemnities by the Company had the order for compulsory winding up not been made. From the evidence of the liquidator it appeared that, after investigation of the claims, the total sum due by the Company to creditors was approximately £64,771 2s. 11d., and of this sum the Commissioners' claim amounted to £21,353 7s. 5d. The liquidator was of opinion that the assets would not prove sufficient to meet the claims in full. The Commissioners of Public Works, having requested the liquidator to pay their claim in priority to all the ordinary creditors, on the basis that they, the Commissioners, were entitled to priority as preferential creditors and because the amounts due to them were debts due to the State, the liquidator applied to the High Court for directions in the matter.

R. McGonigal, Senior Counsel (with him *F. H. Sherry*), for the liquidator.

T. P. McCarthy, Senior Counsel (with him *I. J. Kelly*), for

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the Commissioners of Public Works and the Attorney General.

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T. Teevan, Senior Counsel (with him *Brian Walsh*), for Patrick Cunningham, representing the general body of creditors of the Association.

Cur. adv. vult.

KINGSMILL MOORE J. :—

The Irish Employers Mutual Insurance Association, Limited, a company limited by guarantee and having no share capital, is being wound up compulsorily. The total claims allowed by the Examiner to the date of his certificate are £21,278 2s. 11d., of which £13,729 1s. 9d. is due to the Commissioners of Public Works; but further claims have been made, and are apparently good to the extent of £43,493, and of this sum £7,624 5s. 8d. represents additional claims by the Commissioners. The total claims to be anticipated as valid are therefore £64,771 2s. 11d., of which £21,353 7s. 5d. represents claims by the Commissioners. The amount of the available assets has not yet been definitely ascertained, but in the opinion of the liquidator it will not be sufficient to meet all claims in full.

The Commissioners maintain that the full amount of their claim must be paid in priority to any claims by ordinary creditors, because their claim represents a debt due to the State, and as such is a debt entitled to special priority. The liquidator, in pardonable perplexity, has applied to the Court, by motions for directions, to decide whether the claim of the Commissioners for £21,353 7s. 5d. is to be payable in priority to the claims of ordinary creditors, or must rank *pari passu* with them.

The claim of the Commissioners arises in the following way: they were engaged in carrying out a number of works of civil engineering in the exercise of obligations imposed on them by various and widely differing statutes, which it will be necessary to examine more particularly at a later stage. To carry out those works it was necessary for them to employ workmen, and they were anxious to insure against the various branches of employers' liability. In February, 1937, the Commissioners caused to be inserted in the daily papers an advertisement inviting tenders for insurance against employers' liability in respect of workmen to be employed during the financial year beginning on the 1st April, 1937. The Irish Employers Mutual Insurance Association, Limited, who had carried a similar risk in former years, duly sent in a tender on the 8th March, 1937, giving their terms for insurance against "Liability under Common Law, Fatal

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Accidents Acts of 1846 and 1859, Employers' Liability Act, 1880, Workmen's Compensation Act, 1934, and any amending or extending Acts, which, during the currency of the policy may be in operation; also medical and surgical expenses as provided for under section 73 of the Workmen's Compensation Act, 1934." The tender was accepted subject to some further conditions (to which the Association agreed) and a policy was issued. This procedure was repeated in the year 1938 and a policy taken out against similar liabilities for the financial year beginning the 1st April, 1938.

On the 4th July, 1938, an order was made for the compulsory liquidation of the Association, which accordingly became unable thenceforth to carry on its business, and the Commissioners were obliged themselves to satisfy the claims of their workmen in respect of accidents, and to make provision for fresh policies of insurance. It is alleged that the funds to meet those unexpected commitments came out of moneys voted by the Oireachtas by the annual Appropriation Acts, and that any sums recovered from the Association will be paid into the Central Fund.

Mr. McCarthy, who appears for the Commissioners, the Attorney General, and the Minister for Finance, maintains that all sums due to the Commissioners should be paid in priority to the claims of ordinary creditors. He bases his argument on two main grounds.

First he claims a statutory priority under s. 38, sub-s. 2, of the Finance Act, 1924, which provides that "moneys due or payable to or for the benefit of the Central Fund shall have and be deemed always to have had attached to them all such rights, privileges, and priorities as have heretofore attached to debts due to the Crown." It has been decided by the President, in *In re Irish Aero Club: Gillic* v. *Minister for Industry and Commerce and Minister for Defence* (1), that the sub-section only applies to taxes and duties under the care of the Revenue Commissioners. This decision is one with which I agree and which, even if it is not strictly binding on me, I am prepared to follow. Consequently I reject the claim in so far as it is based on this section.

Secondly, he relies on the old common law prerogative of the King to have his debts paid in priority to creditors of equal degree. Shortly summarised his argument on this point is as follows:—

"If the constitutional position had remained as it was in 1921, then the Commissioners in effecting the insurance would have been acting as servants of the Crown, and the

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(1) [1939] I. R. 204.

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money which they claimed under the policies would have been a Crown debt. As matters stand now they are State servants, and the moneys they claim are a State debt to which the same priority attaches as formerly attached to a Crown debt. The Crown prerogative of priority was preserved in its entirety in Saorstat Eireann. Under Article 51 of the Constitution of Saorstat Eireann the executive authority of the new State was vested in the King and was exercisable by the representative of the Crown. Article 73, which preserved the law in force when the Constitution came into operation, except in so far as it was inconsistent with the Constitution, made all Crown prerogative rights exercisable by the executive in Saorstat Eireann in as much as such rights were part of the law preserved. The prerogative rights, so preserved, continued to exist up to the 11th day of December, 1946, and accordingly Article 49 of our present Constitution operates to confer these prerogatives on 'the People' (which means 'the State'), and provides for their exercise by or on the authority of the present Government. The Attorney General is the proper person to assert this claim on behalf of the Government and his counsel is in a position to put forward the claim before the Court."

Mr. McGonigal for the liquidator, and Mr. Teevan, for creditors, resist the claim to prior payment on various grounds. First, they assert that there was no priority for Crown debts in a winding up by the Court: secondly, they deny that the Commissioners were acting in the capacity of agents or servants of the State in taking out the insurance policies, and if this be so, the sums claimed by them cannot rank as State debts: thirdly, they deny that State debts are now entitled to the priority which was formerly enjoyed by Crown debts: fourthly, they maintain that priority never attached to Crown debts of a commercial or business character: and lastly, they assert that any priority, which might have existed, was impliedly waived by the Commissioners when they effected an insurance with a mutual assurance corporation and, as members of that corporation, became subject to the provisions of its memorandum and articles. Both the inherent nature of mutual assurance and the particular provisions of the memorandum and articles are, in their submission, incompatible with a preferential claim.

The first ground of defence is clearly ruled out by well-established authorities.

The priority in which debts are paid when an insolvent company is being wound up compulsorily depends primarily on two sections of the Companies Act, 1908. Sect. 209 enumerates various classes of debts to which absolute

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priority is given. Sect. 207 provides that in the winding up of an insolvent company the same rules shall prevail and be observed, with regard to debts provable, as are in force for the time being under the law of bankruptcy with regard to the estates of persons adjudged bankrupt. It has been decided (in England by *In re Whitaker* (1) and in Ireland by *McIntosh & Co., Ltd.* v. *Thompson & Co., Ltd.* (2)) that "rules with regard to debts provable" is an expression sufficiently wide to embrace rules governing the priority in which debts are to be paid.

What then are the rules governing priority of payment in bankruptcy? They are to be found in s. 4 of the Preferential Payments in Bankruptcy (Ireland) Act, 1889 (modifying and amplifying s. 49 of the Bankruptcy (Ireland) Amendment Act, 1872), and in s. 249 of the Irish Bankrupt and Insolvent Act, 1857. Sect. 4 gives an absolute priority to the classes of debts therein specified (classes which correspond closely to those set out in s. 209 of the Companies Act, 1908). Subsequent legislation has added further classes of debts to those admitted to priority by s. 4. (See National Insurance Act, 1911, s. 110, Unemployment Insurance Act, 1920, s. 26, Workmen's Compensation Act, 1934, s. 20.) Among the debts so preferred are certain taxes which were admittedly "Crown debts" and it was argued in *In re Galvin* (3) that the inclusion in the section of certain specified Crown debts showed an intention on the part of the Legislature to deprive Crown debts, other than those mentioned, of the priority which would otherwise have attached to them by virtue of the common law prerogative. Palles C.B., who delivered the judgment of the Court in that case, disposed of this contention and laid down that, although an absolute priority was given to the classes of debts specified in the section, yet when once any debt coming within these particular classes had been discharged, the ordinary priority of Crown debts in regard to the remaining assets was unaffected. This judgment was expressly followed and approved by the Supreme Court in *In re K., an Arranging Debtor* (4). On those authorities it is manifest that, if the sums claimed by the Commissioners are sums which are entitled to the priority formerly attached to "Crown debts," then the Commissioners are entitled to be paid in full out of any assets remaining after satisfaction of the debts which are specially preferred by the sections to which I have referred. I hold, therefore, that the first line of defence fails.

In dealing with the second line of defence, it is necessary

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(1) [1901] 1 Ch. 9.
(2) [1932] I. R. 45.
(3) [1897] 1 I. R. 520.
(4) [1927] I. R. 260.

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first to consider the *general* status of the Commissioners, as prescribed by the statutes which regulated their functions and constitution, and as elucidated by the numerous cases in which, one way or another, that status has come under review.

The Commissioners trace their origin to an Act of 1831 (1 & 2 Wm. 4, c. 33) entitled "An Act for the Extension and Promotion of Public Works in Ireland." It had been common practice throughout the eighteenth and early nineteenth centuries to make special grants or loans, from funds at the disposal of the central executive, for the construction of works which held out promise of advantages to the community at large or to certain localised sections of the community; and the construction and administration of such works was customarily entrusted to bodies of commissioners specially created for the purpose of each project. The Act of 1831 attempted to make more general provisions for such long term investment of State moneys in projects of public utility. A permanent body was created to administer the Act, consisting of three Commissioners, nominated under the Royal Sign Manual, holding office during pleasure, and subject to removal and replacement by fresh nominations. Power was given to them, subject to Treasury sanction, to appoint a secretary, a solicitor and a technical and office staff, all paid from the Irish Exchequer and, subject to like sanction, to make rules and regulations for their own government. The Act foreshadowed the various branches of activity which future Acts were to entrust to the Commissioners in ever-increasing measure. It became their duty to exercise and advise the Treasury on projects for loans and grants, to see to the security for such loans, to ensure their repayment, and, in some cases, to carry out the work themselves. In addition there were transferred to them all the powers, authorities and property of the existing Commissioners for inland navigation, which included the powers of the Commissioners of Fisheries.

The Public Works, Ireland, Act, 1839 (2 & 3 Vict., c. 50), s. 10, prescribed the official title of "Commissioners of Public Works in Ireland." The Public Works (Ireland) Act, 1869 (32 & 33 Vict., c. 74), after enacting "that it has been usual that lands in Ireland required for various departments of public service should be . . . taken by the Commissioners of Public Works in Ireland . . . and it has been customary . . . to vest such lands in the secretary for the time being of the said Commissioners, his heirs, executors, administrators, or assigns, which is found inconvenient," enacted by s. 2 that "for the purposes of this Act, and of taking, acquiring, and holding any lands in Ireland required for any department of the public services or for any public purpose, the Commissioners of Public Works in Ireland for the time being are hereby constituted a corporation, with perpetual succession and a common seal, and with power to hold lands of any tenure." Sect. 4 provided that any lands then vested in the present or any former secretary and held "in trust for any such public department, or on any public trust, or for the use and benefit of the Crown" should vest in the corporation so created. This limited incorporation was enlarged. By the Public Works Loans Act, 1892 (55 & 56 Vict., c. 61), s. 8, the Commissioners were incorporated for all purposes, with perpetual succession, a common seal, and power to hold land. By the Ministers and Secretaries Act, 1924, s. 1 (ii) and the Schedule (First Part), the Commissioners of Public Works in Ireland were named as one of the particular branches of administration assigned to the Department of Finance, which thenceforth controlled their business, powers, duties and functions.

These are the only statutes which I have been able to find bearing directly on the constitution of the Commissioners and, as far as they go, they support the contention that the Commissioners hold the status of Crown (or State) servants. The Commissioners are appointed, paid and dismissed by the executive. Their staff are civil servants. They were clearly controlled by His Majesty's Treasury, which sanctioned their loans and expenditure, and are now under the general control of the Minister for Finance. But the cases to which I shall refer, difficult to reconcile as some of them at first appear, establish that it is not sufficient to consider the *general* status of the Commissioners as indicated in those statutes, but that attention must also be given to the exact functions they purport to carry out in any particular case. A man may be a Crown servant, and may be carrying out a statutory duty, yet the nature of the duty may be such that, in exercising it, he is not acting as a Crown servant and so cannot in the execution of that duty claim all the privileges which the prerogative bestows on the King and his servants.

So useful and adaptable a body did the Commissioners prove to be that tasks of the most varied description were assigned to them as veritable maids of all work. The statutes regulating their activities exceed two hundred in number. Four main categories of such activities may be distinguished.

Their chief pre-occupation was the administration of loans of moneys, usually from the consolidated (now the Central)

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fund, but also from certain specified funds. Such loans might be of the most trivial nature—to supply new sails for a hooker, to plant a shelter belt, to drain three acres of a rushy field, to build a hay barn or buy a few bushels of seed potatoes; or they might run into hundreds of thousands of pounds, to be expended on the construction of railways, harbours, inland navigations or works designed to drain vast tracts of country. Loans might be made to individuals, to local bodies, to commissioners, to trustees. They might be secured by mortgages, bonds, terminable charges, rates or tolls. In each case it was the task of the Commissioners to examine the projects and report on them, to see that the proper securities were provided, to keep an eye to the progress of the works, and to take steps to ensure repayment.

Next they became contractors in their own persons. They had a specialised staff of surveyors, architects, and engineers, and undertook major tasks of civil engineering, such as the construction of harbours, roads, bridges, navigation and drainage schemes. A great number of the public buildings of Ireland—courthouses, prisons, lunatic asylums, libraries, galleries and colleges—were built by them.

Thirdly, they formed a convenient corporation in which ancient monuments and Crown and public property might be vested, and to whose care the management and maintenance of such property might be entrusted.

Lastly, they were made responsible for management of many important public undertakings such as the Shannon navigation and Kingstown Harbour.

The rights and liabilities of the Commissioners in some or other of their widely differing capacities have been considered by the Courts in several cases. By the Drainage, Ireland, Act, 1842 (5 & 6 Vict., c. 89), the Commissioners had been made Commissioners of Drainage in Ireland and entrusted with far-reaching schemes of arterial drainage. In carrying out such duties they negligently injured the water power of a mill and it was held by the Barons of the Exchequer in *Sharpley* v. *Hornsby* (1) that they were liable to a common law action for negligence. This decision was approved by the Master of the Rolls in *Foster* v. *Hornsby* (2) and in *Stubber* v. *Hornsby* (3). *Malley* v. *Hornsby* (4) decided that where the Commissioners acted outside their statutory powers, though without negligence, they were liable for diminishing the water power of a mill. In none of those several cases was it argued that the Commissioners were not liable to be sued for actions done in their official capacity

(1) 2 Ir. C. L. R. 590.
(2) 2 Ir. Ch. R. 426.
(3) 2 Ir. Ch. R. 449.
(4) 3 Ir. C. L. R. 381.

because they were servants of the crown. In *Sharpley* v. *Hornsby* (1) Pigot C.B., at p. 618, after excluding from his consideration any questions which might be raised on the particular provisions of the drainage code, says :—" I am dealing with the Commissioners as a public company, having duties to perform, and on the presumption that they are not exempted from an action at Common Law, either where they exceeded their jurisdiction, or, though acting within it, acted arbitrarily, carelessly or negligently." Pennefather B., at p. 621, says :—"The defendants, substantially in the present case, are a public body, of considerable importance in this portion of the empire, and entrusted with great powers, and, in the exercise of those powers, with a large discretion ; but I cannot admit that they are altogether without responsibility." In all these cases the defence was based on the special provisions of the drainage code and it seems to have been assumed alike by Bench and Bar that a defence on the wider constitutional issues was not open.

Campbell v. *Hornsby* (2), decided some twenty years later, indicates a certain shift of opinion.

Kingstown Harbour had been constructed under powers granted to Special Commissioners by 55 Geo. 3. c. 191 ; 56 Geo. 3, c. 62 ; 1 Geo. 4. c. 69, and 6 & 7 Wm. 4. c. 117, and the management of the harbour was vested in such Commissioners. These Commissioners were appointed by the Lord Lieutenant and were at first a separate body, but not long after the creation of the Commissioners of Public Works, the Lord Lieutenant appointed the existing Commissioners of Public Works to be Commissioners of Kingstown Harbour and the transfer of duties was recognised in the Kingstown and Dublin Port Harbour Act, 1838 (1 & 2 Vict., c. 36), s. 15, which made certain consequential provisions to facilitate the new regime. *Campbell* v. *Hornsby* (2) was an action against the Commissioners of Public Works for damage to a ship which had been injured by striking an underwater obstruction in the harbour. It was heard first on demurrer to one of the pleas in defence and the demurrer was disallowed by the Court of the Exchequer. In the judgments of the court there was considerable difference of opinion. Fitzgerald B. pointed out that the Commissioners of Kingstown Harbour were appointed and removed by the Lord Lieutenant, were subject to his orders and regulations, must obtain his approval to their plans, and were expending money advanced from the Consolidated Fund. He concluded, therefore, that in anything connected with the making or completion of the Harbour, they were in the

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(1) 2 Ir. C. L. R. 590. (2) I. R. 6 C. L. 37 and I. R. 7 C. L. 82, 540.

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position of agents of one of the great officers of state, exercising the prerogative of the Crown in making a harbour within a port, though the aid of an Act of Parliament was needed for such exercise. Hughes B. agreed with him. Pigot C.B. held that the effect of 6 and 7 Wm. 4, c. 117, s. 13, had been to make the Commissioners a permanent body with power to raise dues, to be applied in payment of the expenses of maintaining and regulating Kingstown Harbour, and that the effect of this Act was that the Commissioners ceased to be a public department under the Crown, and instead were placed in dominion over and ownership of the harbour, as public trustees, and not as officers of the Crown.

The plea unsuccessfully demurred to alleged that the injury to the ship was caused by part of the natural bed of the harbour, and that the duties of the Commissioners were confined to the making of artificial works, and did not include the removal of natural rocks. When the case came to hearing it appeared that the injury was caused by a block of cut granite and a verdict was found against the Commissioners. They moved in arrest of judgment and the case was heard before the Court of Exchequer (1) and on appeal before the Exchequer Chamber (2). Deasy B. (with whom Pigot C.B. concurred) held that the Commissioners, although as Commissioners of Public Works they were officers of the Crown, had a distinct capacity as Commissioners of Kingstown Harbour, and were in the same position as the original Commissioners, who were not officers of the Crown, but were public trustees exercising statutory powers for public purposes. Fitzgerald B. differed. He held that the earlier Commissioners were agents of the Lord Lieutenant in executing a prerogative of the Crown with the aid of Parliament, and therefore not liable to be sued in their quasi-corporate capacity. On further appeal the judgment of the Exchequer Chamber was delivered by Whiteside C.J. without calling on counsel for the plaintiffs. He laid emphasis on the right to levy tolls, and considered the Commissioners, in their capacity of Commissioners for Kingstown Harbour, to be statutory trustees liable for negligence.

The case is of importance as showing that, in the opinion of the majority of the Judges who heard it, the mere fact that persons are appointed, dismissed, and largely controlled, by the executive, and that they administer State funds, is not sufficient to make them servants of the Crown. The remark of Deasy B. that the Commissioners of Public Works, as such, were officers of the Crown, was not strictly necessary for the decision.

(1) I. R. 7 C. L. 82.

(2) I. R. 7 C. L. 540.

This latter point, however, was further considered in *Wheeler* v. *Commissioners of Public Works* (1), where Walker L.J., at p. 269, took a view contrary to that of Deasy B., saying that the Commissioners as originally created by 1 & 2 Wm. 4. c. 33 "were not necessarily mere agents for the Crown; they acquired and held property for public purposes, and could sue and be sued in respect of it." Palles C.B., however, in a dissenting judgment, at p. 231, shared the view of Deasy B. He speaks of the original Commissioners as "well-known officers of a Government department, holding office under, and during the pleasure of, the Crown, with salaries payable out of moneys voted by Parliament" and says that "upon them, *as such servants of the Crown*, various duties had been imposed by a vast number of statutes." He did not consider that the subsequent limited incorporation in any way affected the position but thought that the individuals, who from time to time were to constitute the Corporation, were servants of the Crown and it was as such servants they were constituted a corporation. The object of their corporate constitution was "a purpose of State administration and that is a Crown purpose."

In *Burrel* v. *Tuohy* (2) the Commissioners were held liable for injuries to a ship caused by a defective mooring buoy in Kingstown Harbour. The case was ruled by *Campbell* v. *Hornsby* (3).

In *Westropp* v. *Commissioners of Public Works* (4), the Commissioners were held by the Queen's Bench Division to be liable to prosecution for failing to have a free gap in two fishing weirs owned by them in the river Shannon. If they owned those weirs as servants of the Crown it is difficult to see how any prosecution could have lain.

In *Murphy* v. *Soady*, reported in a footnote to *Wheeler* v. *Commissioners of Public Works* (5), the Commissioners for the first time successfully claimed that they were acting as servants of the Crown and so were not liable to an action for negligence in performing their official duties. The plaintiff was lawfully riding in the Phoenix Park when he was injured by an iron railing negligently constructed and maintained by the Commissioners of Public Works who at that time had the management and control of the Park. The case was argued on demurrer in 1886 before the Court of the Exchequer and the judgment of the Court (Palles C.B., Dowse B. and Andrews J.) was delivered by Palles C.B.

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(1) [1903] 2 I. R. 202.
(2) [1898] 2 I. R. 266.
(3) I. R. 6 C. L. 37 and I. R. 7 C. L. 82 and 540.
(4) [1896] 2 I. R. 93.
(5) [1903] 2 I. R. 202, at p. 213.

Phoenix Park was a royal park, originally the private property of the Crown. The public were admitted to it as an act of grace and not as of right. The management of the Park had been entrusted, by various statutes, first to Commissioners of Works and Forests, then to the Commissioners of His Majesty's Woods, Forests, Land Revenues, Works and Buildings, then to the First Commissioner of Works, in England, and finally to the Commissioners of Public Works in Ireland. An examination of the statutes led to the conclusion that the Park had never ceased to be royal property, and that the various bodies to whom its management had been successively entrusted were no more than managers of the King's property, and, as such Crown servants, were not liable to be sued in tort for the negligence of one of their employees. The decision has always met with approval and indeed seems inevitable when the history of the Park and the wording of the relevant statutes are examined.

Wheeler v. *Commissioners of Public Works* (1) is a case remarkable for the length and the erudition of the judgments and the remarkable difference of opinion between Palles C.B. and the other members of the Court of Appeal. St. Stephen's Green was originally private property, managed by statutory commissioners for the benefit of the inhabitants of the houses surrounding the square. In 1877, by the St. Stephen's Green Act, it became vested in the Commissioners of Public Works, who were charged with the duty of maintaining it as a public park and keeping it in good and sufficient repair. No power was given to them to exact rates or tolls for the upkeep of the park, but they might receive private subscriptions for that purpose. Failing the receipt of sufficient moneys from such sources they were authorised to defray the expenses of carrying out the Act from such moneys as might be provided by Parliament for the purpose.

The Commissioners had surrounded a young tree with a spiked iron tree-guard, with which the plaintiff collided, losing an eye as the result. He sued the Commissioners for misfeasance, alleging that he had a right to use the park, and that the defendants had wrongfully erected and maintained structures dangerous to persons exercising their lawful right, and further had negligently maintained such structures in a dangerous condition. The Commissioners raised the defence that St. Stephen's Green was vested in them as trustees for, or as officers or servants of, the Crown, and that they did the acts of which complaint was made as such trustees, officers or servants, and not otherwise.

The Chief Baron carefully considered 32 and 33 Vict.,

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(1) [1903] 2 I. R. 202.

c. 74 (the only statute under which the defendants were incorporated in 1877, at the time of the passing of the St. Stephen's Green Act), and came to the conclusion on the wording of s. 2 that the lands vesting in the Commissioners, as so incorporated, became so vested as Crown lands for Crown purposes. He held that the duty of maintaining the grounds as imposed by the private Act was *prima facie* imposed on the Commissioners as servants of the Crown; that the ultimate liability of maintenance fell on moneys to be provided by the Crown; that the moneys of the Crown were to be received and expended by the Commissioners as servants of the Crown and were to be accounted for by them as such servants; that the public for whom the Green was to be kept up could only properly be represented by the Crown; and that the only conclusion to be drawn from all these facts was that the duty imposed by the private Act was imposed upon the corporation of the Commissioners as a servant of the Crown and not otherwise. Accordingly he held that the action did not lie against the defendants in their corporate capacity. The Judges who formed the majority found themselves unable to agree with either the intermediate or the final conclusions of the Chief Baron. They held that the Commissioners, in their management and maintenance of the Green, although they could charge no rates or tolls, were in the same position as the Mersey Docks Trustees, namely, a corporation performing a public duty for the benefit of the public in general, and were in no way servants of the Crown or officers of the State in their performance of their duties under the Act.

Attorney-General v. *Howley* (1) decided that, when the Commissioners, acting under the Land Law Ireland Act, 1881, s. 31, sub-s. 2, made a loan to an occupier of land out of moneys advanced by the Treasury and took a charge on lands to secure its repayment, the money so charged remained money of the Crown even though the charge was, in form, made in favour of the Commissioners. The money, while in the hands of the Treasury and the Commissioners, was Crown money, and any repayment of a loan thereof was repayment of a Crown debt. The Commissioners were mere "conduit pipes" through which the loan and its repayment must flow.

The decision in *Cork County Council and Burke* v. *Commissioners of Public Works and Others* (2) in so far as it deals with the status of the Commissioners followed inevitably from *Murphy* v. *Soady* (3). Certain houses on Haulbowline were the property of the State, and the Commissioners had

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(1) [1914] 1 I. R. 124.
(2) [1945] I. R. 561.
(3) [1903] I. R. 213 (footnote).

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taken possession of them purely as agents for the State and managed them as such. They were, accordingly, entitled to assert on behalf of the State any prerogatives which the State could rightfully claim.

In England, His Majesty's Commissioners of Works and Buildings are a corporation which in a more limited sphere corresponds to our Commissioners of Public Works. Their position has been several times considered by the English Courts. *In re Wood's Estate* (1) was decided on the ground that the Crown was bound by the statutes there under consideration, but the Court seems to have inclined to the opinion that, even apart from the statutes, the Commissioners did not represent the Crown so as to be able to claim immunity from payment of costs. In *Graham* v. *Public Works Commissioners* (2) the Commissioners were sued for a breach of contract entered into by them for the erection of a post office, and it was held that an action lay. Ridley J. considered that the Commissioners could be considered as principals in the contract. Phillimore J. considered them to have contracted as servants of the Crown, but thought that the effect of their incorporation was to make them suable otherwise than by petition of right and subject to a declaratory judgment. In *Roper* v. *Public Works Commissioners* (3) the Commissioners had become tenants of premises for the purposes of a labour exchange. They were sued in trespass and nuisance and Shearman J. held that in taking the premises they were acting as servants of the Crown and as such not liable to be sued in tort.

In *Public Works Commissioners* v. *Pontypridd Masonic Hall Company* (4) the Commissioners had become tenants of the hall for use in connection with a county court. By inadvertence they continued to pay rent after the tenancy had terminated, and they now sued to recover the moneys so paid in mistake of fact. The Statute of Limitations was pleaded, but in vain, for the Judge, Bankes L.J., held that they were acting as agents for the Crown in endeavouring to recover the money.

Sanitary Commissioners of Gibraltar v. *Orfila* (5) was the subject of close examination in *Wheeler's Case* (6), but I am unable to derive much assistance from it. The basis of the decision was that the Orders in Council governing the duties of the Commissioners were not such as to make them liable for misfeasance.

Finally I come to *Gilbert* v. *Corporation of Trinity House* (7).

(1) 31 Ch. D. 607.

(2) [1901] 2 K. B. 781.

(3) [1915] 1 K. B. 45.

(4) [1920] 2 K. B. 233.

(5) 15 App. Cas. 400.

(6) [1903] 2 I. R. 202.

(7) 17 Q. B. D. 795.

The Corporation were entrusted by statute with the superintendence and management of all lighthouses and beacons in England and the adjacent seas. It was entitled to charge dues which were paid to the Mercantile Marine Fund, out of which necessary expenses were paid, and this fund was augmented by grants from the Consolidated Fund. The Board of Trade exercised a close control over its expenditure. The judgments are of a negative character. Day J. held that the Corporation could not be regarded as a servant of the Crown. "It is a corporation with very great powers vested in it by statute, but in no possible sense can it be deemed to represent the Crown. All the great officers of state are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals." Wills J. refused to regard the Corporation as being on the same footing as "a great officer or a great department of State." The expression, "emanation from the Crown," has subsequently been criticised as being so vague as to be meaningless, or at least, unhelpful. (*International Railway Co.* v. *Niagara Parks Commission* (1); *Tamlin* v. *Hannaford* (2).)

I have, I think, reviewed all the cases which were cited (and a few which were not) having any bearing on the question as to whether the Commissioners were or were not acting as servants of the State. It is significant of the difficulties attending an apparently simple problem that no judge has attempted to lay down any positive or universal test. But certain guiding principles may be discerned.

1. The constitution of the body doing the act must be examined and, when it is created by statute, the first task is to interpret the statute: *Mersey Docks Trustees* v. *Gibbs* (3); *Sanitary Commissioners of Gibraltar* v. *Orfila* (4).

2. When a body is incorporated generally, or to all intents and purposes, then no conclusion can be drawn from the nature of its incorporation. In *Wheeler's Case* (5), Palles C.B., dealing with the first and limited incorporation of the Commissioners (under 32 and 33 Vict., c. 74), considered such incorporation to indicate that the Commissioners were Crown servants, but it is clear from his remarks on *Graham's Case* (6) that if the incorporation had been general, as it now is, he would have modified his view. The other members of the Court considered even the limited incorporation inconclusive as to whether the Commissioners were acting as Crown servants or not.

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(1) [1941] A. C. 328, at p. 343.
(2) [1950] 1 K. B. 18, at p. 22.
(3) L. R. 1 H. L. 93, at p. 104.
(4) 15 App. Cas. 400, at p. 408.
(5) [1903] 2 I. R. 202.
(6) [1901] 2 K. B. 781.

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3. The terms of the statute which impose on the Commissioners the particular duty which they are carrying out may be decisive of the question whether, in carrying out such duty, they are acting as Crown servants, or as a corporation of the nature of the Mersey Docks Trustees: *Wheeler's Case* (1) per FitzGibbon L.J., at p. 244 and *Campbell* v. *Hornsby* (2).

4. Where the Commissioners are managing Crown or State property any acts done in the course of such management are *prima facie* done as servants of the Crown or State: *Murphy* v. *Soady* (3); *Cork County Council and Burke* v. *Commissioners of Public Works and Others* (4); *Roper* v. *Public Works Commissioners* (5); and *Public Works Commissioners* v. *Pontypridd Masonic Hall Company* (6).

5. When the Commissioners act only as conduit pipes to effectuate loans from Crown or State funds to individuals and to provide for the recovery of such loans, they are acting as servants of the Crown or State: *Howley's Case* (7).

6. The mere fact that the Commissioners are financed partially (and, it would seem, wholly) from State funds in carrying out any particular task is a matter which must be taken into account, but is in no way decisive. *Corporation of Trinity House Case* (8) and *Wheeler's Case* (9)).

7. Where the work is being done for the benefit of a particular locality it is an indication that it is being done for public rather than for State purposes. But even where the works are done in pursuance of a general scheme affecting many diverse localities this fact is not conclusive that what is being done is done by the Commissioners as servants of the State: *Corporation of Trinity House Case* (8).

8. The degree of direction and control which is exercised by the executive over the conduct of the work may afford an indication as to whether the Commissioners in executing the work are acting as servants of the State.

The most important elements to be considered in determining the status of the Commissioners in their performance of any task assigned to them, would appear to be the nature of the duties which they are carrying out, and the statutory provisions—if any—to which they are conforming in the exercise of such duties. The two insurance policies—for the years ending 31st March, 1938, and 31st March, 1939, respectively—were each effected for a single lump sum premium, which was subject to subsequent adjustment, but it was made clear to the insurer, in the negotiations for the policies, that the insurance was to cover accidents to workmen engaged on different types of public works, and, in the schedules to the policies, five categories of such works are enumerated with provisional estimates of the numbers of men likely to be employed on each category and the probable total of their wages. The categories are (*i*) Arterial Drainage Works, (*ii*) Maintenance of Marine Works, (*iii*) Fishing Piers and Landing Slips, (*iv*) Employment Schemes and (*v*) Airports. It has been argued that the policy must be regarded as indivisible, and that if, in the execution of any of these categories of works, the Commissioners appear not to have been acting as servants of the State, then they could not have been acting in such capacity in taking out the policy. I am of opinion that the inclusion of the various categories in one policy was a mere matter of convenience and that, for the purpose of deciding the position of the Commissioners, the policy may be regarded as if it was five separate policies, one for each of the categories of work detailed in the schedule. Accordingly it is necessary to examine each category separately.

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(1) [1903] 2 I. R. 202.

(2) I. R. 6 C. L. 37 and I. R. 7 C. L. 82 and 540.

(3) [1903] 2 I. R. 213 (footnote).

(4) [1945] I. R. 561.

(5) [1915] 1 K. B. 45.

(6) [1920] 2 K. B. 233.

(7) [1914] 1 I. R. 214.

(8) 17 Q. B. D. 795.

(9) [1903] 2 I. R. 202 (per FitzGibbon L.J., at p. 253).

The work in connection with the airports was work done on lands which had been acquired by the Minister for Industry and Commerce in his corporate and official capacity, and which was held by him on behalf of the State. The work was done by agreement with the Minister for Finance pursuant to the statutory powers given by Part V of the Air Navigation and Transport Act, 1936 (No. 40 of 1936). The finances for the work were voted by the Oireachtas. *Murphy* v. *Soady* (1) seems in point and decisive. Ownership, finance and direction were exclusively in the hands of the State and its Ministers, and the Commissioners would seem clearly to have been acting as servants of the State in carrying out those works.

The largest claim, £9,638, is made in respect of accidents to workmen engaged on schemes for the relief of unemployment which, according to Mr. Derham's affidavit, are governed by no statutory provisions whatsoever. None of the counsel engaged were able to refer me to any relevant statute, nor have I been successful in discovering any. In the Appropriation Act, 1937, Schedule B, Part II, Vote 69, there appears a vote of £1,500,000 appropriated for "Schemes for the provision of employment and the relief of distress, including cost of administration." In the Appropriation Act, 1938, again under vote 69 of Schedule B, Part II,

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(1) [1903] 2 I. R. 213 (footnote).

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£1,500,010 is appropriated for the same purpose. The expenditure of these large sums is left to the uncontrolled discretion of the executive, subject to subsequent examination and certifying of the relevant accounts by the Comptroller and Auditor General. No details of the expenditure are given in these accounts as presented to the Dail. The nature of the schemes, the manner of their execution, their locality, the amounts paid for any particular work, indeed everything connected with the utilisation of the moneys granted, is left to the choice and discretion of the executive, who deal with it as a matter of legitimate government policy. Whatever may have been the political views of 1832 when the Commissioners came into being, it can now hardly be questioned that the relief of widespread unemployment is properly a matter for the central government, and not merely the concern of local bodies. It is stated on affidavit that the schemes under this head are carried out by various Government departments. The Minister for Finance, through his Parliamentary Secretary, controls the allocation of the moneys, and he assigns to the Commissioners the task of carrying out by means of direct labour certain schemes of which he has approved. As all the moneys are voted by the Oireachtas to be at the uncontrolled discretion of the executive in regard to the details of their application, and as the Commissioners are not acting in pursuance of any statutory obligations, but under the direct instructions of the executive in the furtherance of Government policy, I do not see how they can be considered to have been acting otherwise than as direct servants of the State in carrying out the works, and consequently in effecting an insurance against liability for injuries to workmen employed on those works.

The next largest claim, £5,189, is for compensation to workmen engaged on works of arterial drainage. In contrast to the absence of statutory provisions regulating the work done under unemployment schemes we find that two statutes, the Arterial Drainage Act, 1925, and the Barrow Drainage Act, 1927, regulate every phase of the work undertaken under this head. The two statutes have much in common. Under each Act portion only of the necessary finances is provided by the Minister, out of moneys voted by the Oireachtas, another portion being only lent by the Commissioners and repayable in annual instalments of principal and interest by the councils of the counties benefited by the works, the funds for repayment being provided by the County Fund, in the case of arterial drainage schemes, and, in the case of the Barrow drainage, by the County Fund augmented by portion of the drainage rates. Under the

Arterial Drainage Act, part of the initial expenditure is met directly by the county councils.

Under each Act the drainage works vest in the county councils who ultimately take over responsibility for their maintenance or repair, directly or through a drainage board. Under each Act the benefits are local, and the expenses are met, though only partially, by a local levy. Schemes of arterial drainage are inaugurated by a petition presented to the county council by private persons and, after preliminary consideration by the county council aided by a report from their surveyor, are referred to the Commissioners. Under the Barrow Drainage Act the reference to the Commissioners is made by the statute itself. Thereafter the procedure is almost identical under the two Acts. The Commissioners prepare a scheme with maps and the most meticulous details of all aspects of the contemplated undertaking. Notices of the draft scheme are published and the scheme is made available for inspection. Persons whose rights may be affected are informed. Objections are considered and, if necessary, a local inquiry is held. When finally settled, the scheme is submitted to the Minister for Finance who may confirm, alter or reject the scheme. When the Minister has given his decision the scheme is carried out by the Commissioners and compensation is paid to persons adversely affected. Finally, the Commissioners prepare a draft award showing the works executed, the benefits conferred on the owners of lands and the proportions in which those who have benefited should contribute to the new drainage rate. The draft award is published and any objections are considered at a local enquiry as a result of which the Commissioners may modify their draft award. The final award operates to vest the works in the county councils and make them liable for the maintenance and repair, though, in the case of the Barrow Drainage, the Minister for Finance makes an annual contribution for a limited period, and charges the repayment of the loan on the County Fund.

How does the State come into all this ? Part of the expenditure is provided by the Minister for Finance out of voted moneys and the Minister has the final say in the approval or disapproval of the scheme. The works are carried out by a body which is a department of the Ministry of Finance and whose officials are civil servants. But the cases to which I have referred, especially *Wheeler's Case* (1), decide that none of these elements, separately or collectively, are in themselves sufficient to make the Commissioners into State servants when they are carrying out work for the

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(1) [1903] 2 I. R. 202.

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benefit of a section of the public. On the other hand th completed works do not vest in the State or in the Commissioners, but in local bodies; the expenses are paid to a large extent by the persons benefited and by the County Funds: the responsibility for repair is local.

I am of opinion that in carrying out those schemes the Commissioners are acting as public servants and not as State servants. In effecting the insurance they must be considered as acting, at least in some degree, as the servants of those local bodies who are liable ultimately to share the cost of the construction of the works, among which costs the expenses of insurance would properly be included.

I am, therefore, unable to hold that in carrying out those works or in effecting insurances in respect of those works the Commissioners were clothed with the status of State servants.

No compensation was paid in respect of injuries to workmen employed on the maintenance of marine works, or on fishery piers and landing slips, and so it is not necessary to consider in detail the status of the Commissioners when undertaking works under those categories. Should any claims arise subsequently I should require more evidence as to the method of financing the works carried out under those headings, for the statutes applicable are numerous. Mr. Derham says that any works under the heading of Marine Works were financed from the fund set up under the Marine Works (Ireland) Act, 1902, s. 4. If this is so, I fail to see how the Commissioners can claim to have been acting as State servants, for that fund is kept up by contributions from county councils, augmented by the moneys produced by tolls and rates charged for the use of the works.

On the assumption that the Commissioners, in carrying out employment schemes and the work on airports, were acting as State servants, and that in entering into assurance policies in respect of the liability to their workmen under those heads they did so as State servants, and that all moneys payable under such policies rank as State debts, the Commissioners would be in a position to claim successfully any priority in the payment of such debts to which the State may now be entitled.

It was argued by Mr. McGonigal, as his fourth line of defence (which it is convenient to treat next) that the State could not maintain any claim to priority in respect of debts which were of the nature of business or mercantile debts, even if it was entitled to succeed to all the prerogatives formerly enjoyed by the Crown. There was no decision, he said, in favour of such a claim and no attempt to put forward

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such a claim was recorded until the suggestion was first made in *Food Controller* v. *Cork* (1). That case was finally decided against the Crown on the wording of the Companies Act, and so it became unnecessary to determine the validity of a claim that priority attached to debts of a business nature: but both Lord Atkinson and Lord Shaw adverted to this question in the course of their judgments. Lord Atkinson expressed some doubt as to whether such debts should be classed as Crown debts, and Lord Shaw clearly dislikes priority being granted for debts of this nature and expressly reserves the point as to whether such a claim is valid. The absence of any authority is remarkable. The needs of the armed services alone must have necessitated the making of vast and innumerable contracts in the course of the nineteenth century and it is impossible to conceive that no case arose either in proceedings in bankruptcy before the English Bankruptcy Act of 1883 or in the liquidation of companies under the earlier Companies Acts, in which the Crown was in a position to assert priority for a debt of a business nature. As usual the absence of authority has been explained on the one hand as showing that the Crown had not the hardihood to put forward such a claim, and on the other hand as proof that no one had been sufficiently misinformed to deny its validity. The true explanation may easily be that the Crown, while never abandoning such a contention, thought it politic not to pursue it, a course which, Mr. Kelly tells me, is frequently taken by the Commissioners. If such claims were common, State patronage might prove fatal to a commercial undertaking. Persons seeking insurance would fight shy of a company known to carry State risks, remembering that if the company got into difficulties ordinary creditors would not obtain their fair share of the assets. Nor would there be any inducement to business men to enter into contracts or to supply goods on credit to a contractor working for the State for again, should he fall on evil days, State claims for breach of contract might oust all other creditors. A wise appreciation of such difficulties may easily have induced statesmen to forbear from asserting a claim which, though legal, was impolitic. If, however, the view which I subsequently adopt as to the origin of the prerogative right to priority in payment of debts is correct, I am unable to see why the right should not extend to Crown debts of a business nature. The mediaeval king with his vast estates could not avoid being involved in commercial transactions, and he often indulged in business on a big scale. It is difficult to conceive that in such transactions his judges

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(1) [1923] A. C. 647.

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would not have accorded to him his normal prerogative rights. It is not necessary to decide this point in view of the conclusions at which I have arrived as to the position of State debts in general.

As the second line of defence only prevails to defeat that portion of the Commissioners' claim which arises out of the construction of the works of arterial drainage (including the Barrow Drainage Scheme) and works of marine maintenance, the third line of defence, which asserts boldly that the State has no common law rights of priority payment must next be examined. Mr. McGonigal and Mr. Teevan stood upon the decision of the late President in *In re P. C., an Arranging Debtor* (1), a decision which, if correct, carried them the whole way. In that case the Minister for Posts and Telegraphs claimed that a debt due for telephone services, which admittedly was payable to and for the benefit of the Central Fund, took priority over the debts due to ordinary creditors. This claim the President rejected. Following his earlier decision in *In re Irish Aero Club* (2), he held that the statutory priority conferred by s. 38 of the Finance Act, 1924, was only applicable to debts incurred in respect of taxes and duties. The alternative claim, based on a common law prerogative, he refused on the ground that no such prerogative existed in Saorstat Eireann, and accordingly that Article 49 of our present Constitution, which only continued such rights as existed in Saorstat Eireann on the 11th December, 1937, had nothing on which to operate.

Although the decision of a co-ordinate Court is not binding I would be very slow to differ from a considered view of the late President, who was so deeply versed in the constitutional law of Great Britain and the Commonwealth, and who had himself taken such a prominent part in our own constitutional development. His view was based on broad propositions which were to him so manifest as not to need justification by any elaborate citation of authority. To me those propositions did not appear so self-evident and, accordingly, in an attempt to satisfy myself of their validity, I have been driven to make some researches into history and constitutional law and practice. The result has been to convince me of the correctness of the President's proposition and it would be sufficient to leave the matter there, but, as the subject is not fully dealt with in any text-book, and as this case is almost certain to go further, I have endeavoured to summarise the investigations which convinced me of the correctness of the President's decision and which led into regions not often explored by modern practising lawyers.

(1) [1939] I. R. 306.

(2) [1939] I. R. 204.

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The three propositions on which the judgment of the President rests are as follows:—

1. The common law prerogative of prior payment of his debts belonged to the king, not because he was the supreme executive authority, but because of the personal pre-eminence over all subjects which attached to him at common law, on the principle expressed in the phrase "*detur digniori*."

2. (*Semble*) This prerogative is an ancillary right. It does not create a debt, but only prefers a debt already in existence, and the debt which is preferred must be one which, in the eyes of the law, is due to the king in person.

3. Moneys payable to the Central Fund of Saorstat Eireann were not debts due to the king in person since the Central Fund had not the characteristics of, and was not, a royal fund or exchequer.

The first two propositions depend upon the constitutional law, practice and history of England: the third on the constitutional law, practice and history of Ireland and the Commonwealth.

Blackstone (Commentaries, 16th ed., 1825, vol. 1, at p. 239) divides the prerogatives of the king into two classes, the "direct" and the "incidental." The direct prerogative he defines as "such positive substantial parts of the royal character and authority, as are rooted in and spring from the king's political person," and such prerogatives would, in general, have been preserved by the Saorstat Eireann constitution, which vested executive authority in the king, and would now (by Article 49 of our Constitution) belong to the People and be exercisable by the Government. The incidental prerogatives on the other hand are defined as "exceptions, in favour of the crown, to those general rules that are established for the rest of the community," and the right to priority payment of debts is given as an example of such prerogatives.

The two classes of prerogative have different roots and, in spite of some overlapping may be considered broadly as arising from different theories of sovereignty and originating at different historical periods.

According to Professor Holdsworth (History of English Law, 3rd ed., 1923, vol. 3, at p. 459) the incidental prerogatives came into being in the mediaeval period when "the King was regarded quite as much as a superior feudal lord with special privileges as a ruler entrusted with the executive powers of the state." The direct prerogative, on the other hand, with its theories of perfection, immortality and so forth, was a product of the sixteenth and early seventeenth centuries, when the royal lawyers elaborated for the king "a politic capacity and emphasised his powers in such a way that, through his prerogative he was able to act as the executive of a modern State."

That the king enjoyed from the earliest period of our legal history the right of being paid his debts in priority to all other creditors is incontestable. Magna Carta (9 Hen. 3. c. 18) has always been considered as declaratory of the common law in its provision that if a man die indebted to the king the sheriff may attach all the goods and chattels of the dead and keep them until the king's debt is paid, a right which was enforced by a special writ known as "*diem clausit extremum*" (Staundforde Prerogativa Regis 51 c. 17). Madox, History of the Exchequer, gives in the notes to pp. 662, and 663, some examples of early exchequer writs. Among them are two taken from the Rolls of 22nd Hen. 3. which restrain executors from taking the goods of a deceased debtor until the king's debt was satisfied, and allege a custom of the realm that the king should be paid first. The developed practice may be found in Wentworth's Office of an Executor, 14th ed., 1829, at pp. 190–195, and *R.* v. *Curtis* (1). That the king exercised the same rights against living debtors is shown by an extract from the Red Book of the Exchequer Folio 245 (printed in vol. 3 of the Rolls series, ed. Hall, at p. 830) which contains a writ of Edward I, in the year 1275, reciting :—"*Inter ea quae regiam dignitatem exornant illa consuetudo antiqua nostrorum et predecessorum nostrorum temporibus usitata ita nos praerogat quod a quibuscumque debitoribus nostris sunt debita nostra levanda et de bonis eorum solvenda priusquam eorum creditoribus satisfiat.*" a formula which remained unchanged at any rate until the time of Elizabeth when it appears translated into English, in the writ in *Hunt's Case* (2).

In the case of a living debtor, the king gave effect to his prerogative by a special writ of protection which prevented any other person from entertaining a suit against such debtor until the king's debt had been paid (see Fitzherbert, Natura Brevium 28 B and a precedent in the old "Register of Writs," 281b). But in the words of Coke (Co. Lit. 131b) "hereof grew some inconvenience for, to delay other men in their suits, the King's debts were the more slowly paid." Accordingly the statute, 25 Edw. 3, c. 19, was passed, which, after reciting the existing practice of issuing writs of protection, provided "that notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King's Court by their debtors; and if judgment be thereupon given for the plaintiff or demandant, the execution of the same judgment shall be put in suspense till [satisfaction] be made to the King of his debt; and if the creditors will undertake for the King's debt, they shall be thereunto received, and shall have execution against the debtors of the debt due . . . and also shall recover against them as much as they shall pay to the King for them." Nothing could more plainly establish the ancient existence and current acceptance of the prerogative than this statute. The outside creditor may, henceforth, sue the king's debtor, but he cannot get execution till the king's debt has been paid.

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(1) (1749) Parker 94.

(2) 3 Dyer 328b.

So the law remained until 33 Hen. 8, c. 39, s. 74, which enacted:—"That if any suit be commenced or taken, or any process be hereafter awarded for the . . . recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons: . . . so always that the King's suit be taken and commenced, or process awarded for the said debt at the King's suit before judgment given for the said other person or persons."

The first part of this section has always been considered as merely declaratory of the contemporary common law. The second half gave rise to a legal controversy which split Westminster Hall for three centuries. The Court of the Exchequer, in a long series of cases, uniformly held that the statute had no application where there were two writs of execution current at the same time, one for the debt of the king, and one for the debt of the subject, and that the king's execution took precedence over that of the subject unless the subject's execution had been *completed* by sale or alienation of the debtor's property before the king's writ issued. On this view the sole effect of the statute was to remove the pre-existing bar whereby the subject was prevented from even issuing execution till the king's debt was paid. Gilbert, Historical View of the Court of Exchequer (1738), at pp. 113–115, upholds the view of his brother Barons. On the other hand the King's Bench in *Rorke* v. *Dayrell* (1) and the Common Pleas in *Uppom* v. *Summer* (2) and Comyn C.B. in his Digest, took the view that the section meant what it apparently said, and that an ordinary creditor who obtained his judgment and issued execution, before any process issued for the Crown, was entitled to priority. Ultimately, in *Giles* v. *Grover* (3) the House of Lords (after consulting the judges who were divided in opinion) upheld the view of the Exchequer.

(1) 4 T. R. 402.

(2) 2 Bl. 1251, 1294.

(3) 1 Cl. & F. 72.

The statute of Henry 8 did not extend to Ireland though this question was for some time not beyond doubt. (Howard's Treatise of the Exchequer and Revenue of Ireland, ed. 1776, vol. 1, at p. 287.) The matter was subsequently regulated by an Irish statute of 1782, 21 & 22 Geo. 3, c. 20, s. 4, which follows the wording of s. 74 of the English statute save that the limiting words are : " so always, that such suit of your Majesty . . . be commenced, or process awarded for the said debt, at the suit of your Majesty, before *execution began* for the said other person or persons," a provision much more in favour of the subject than that of the English statute as finally interpreted.

The statutes to which I have referred establish clearly the ancient existence of this prerogative and regulate the manner in which it is to be enforced, but they give no clue as to its origin, its nature, or its theoretical justification. For light on these questions it is natural to look to the earliest text-books and reported decisions. The result of such an investigation is disappointing ; there is a surprising dearth of authority.

Staundforde in his Prerogativa Regis (1548) beyond a passing reference to the writ of " *dum clausit extremum* " has nothing to say on this subject. This is not significant. His work does not purport to be exhaustive and in two passages he warns readers that there are many prerogatives with which he has not dealt. The great sixteenth century abridgements of the Year Books are not much more illuminating. FitzHerbert (1514) contains, as far as I have been able to find out, but one reference (Execution, pl. 38) which purports to be taken from Year Book 41, Edw. 3, Pasch. If so, he must be citing from a manuscript which has been lost or has not been printed—at least no edition of the Year Book which I have been able to consult contains this case either in the Easter Term or elsewhere during the year. Others seem to have found the same difficulty in verifying this reference for the case though several times mentioned in later judgments is always quoted in the words of FitzHerbert's Summary. His extract gives a contemporary picture of the way in which the statute of Edw. 3 operated. It having been officially brought to the notice of the Court that the defendant in the case was a debtor to the king, the Court stayed execution upon the judgment, refused a *capias*, and entered continuances on the roll. Brookes' Abridgement (1570) also contains only one reference, Y.B. 21 Edw. 4, Pasch pl. 2. This case records a discussion among the judges—not very germaine to the matters then at issue—in which the majority gave it as their opinion that an executor should only accord absolute priority to the king's debt if it was a debt of record, and that a subject's debt of record took priority over a king's debt which was not of record.

The paucity of direct authority may be explained on the ground that this prerogative was already so ancient, so notorious, and so undisputed that there was little scope for argument, nor was there any interesting development to report. We are left, therefore, to deduce its nature and origin as best we may from an examination of the underlying conceptions of the feudal system and the mediaeval kingship.

The feudal tie, though based on the ownership of land, was essentially personal and the mediaeval king was conceived as being a living person, and not a corporate abstraction. Maitland's words are well known. "The mediaeval king was every inch a king, but just for this reason he was every inch a man and you did not talk nonsense about him. You did not ascribe to him immortality or ubiquity or such powers as no mortal can wield" (Law Quarterly Review, vol. 17, at p. 132). Professor Holdsworth says that the mediaeval king was "very like a feudal lord writ large. His powers were the powers of other feudal lords magnified": History of English Law, 3rd ed., 1923, vol. 3, at pp. 460 *et seq.* His ordinary revenue was not properly a national revenue. It was derived from his ancient demesne, the feudal incidents, and his prerogative rights. Out of this revenue he was expected to maintain his establishment, including his judges, officers, and foreign envoys. Should he look for a subvention he would be met with the answer, "*Que notre seigneur le roi vive de soen.*" *De soen*—his own property. His treasure was his own personal treasure administered by the officials of his Exchequer and to be spent as he wished. Even his rights of jurisdiction, according to feudal notions, were a form of property. He could not be sued in his own Court and in early days not infrequently presided there. In time both king and lord found it necessary to delegate their powers in the one case to the judges, in the other to the steward or even to a trained lawyer. But the judges were still in close touch with the king, dismissible at pleasure, unwilling to proceed in any case, where the king might be involved "*rege inconsulto,*" and studious to protect their master's interest. We may be tolerably sure that the practice and procedure of the Courts would be evolved in a way which was favourable to those interests. The influence of the Exchequer, too, was great. Not only did it issue its own writs to secure the royal property but, when Henry 2 in 1178 chose, out of the itinerant judges, five persons to remain at the king's court as a nucleus of a central judicial body, they were selected from Exchequer officials: Medlay's Constitutional History, 367; Dialogus De Scaccario, lib. 1, c. 4–6. It is somewhat more than a plausible conjecture that the king's prerogative of prior payment was introduced by his judges and officials as a useful piece of adjectival law to help a usually impoverished monarch in the collection of his personal income, and that, if any rashly curious person had questioned the legality of the privilege, it would have been easy to cloak the high-handed element in such a procedure by reasoning which showed that it was inherent in the king's ownership of the machinery of justice and justifiable by his supereminent position as paramount overlord. The writ of Edw. 1, already quoted, did indeed claim the right as being ancient, customary and an appanage of the royal dignity, but the royal dignity of the thirteenth century was the dignity of a mortal man and not that of an executive symbol.

It was not till the period of the Year Books had ceased and the nominate reporters had taken over the task of recording the views of the judges that we find the prerogative of priority subjected to any critical scrutiny.

The nominate reports begin in the middle of the sixteenth century, when a new era of political thought and theory had been inaugurated. The Middle Ages had passed and the modern state was in its infancy. Feudalism was a spent force, and although feudal privilege still survived, nationality was making itself felt and novel doctrines of sovereignty were on the way. In France an absolute monarchy was to be established: in England it was to be attempted, to attain partial realisation under the Tudors and Stuarts, and ultimately to fail. In the course of the attempt, the old prerogative was to be extended and transformed. It ceased to be merely a bundle of concrete feudal privileges and swelled to an assortment of theoretical claims and palpable fictions, some of which were swept away by the revolution and the subsequent legislation; others of which still survive as being convenient for the efficient working of a central executive. The king was transmuted from a man to a corporation sole, ubiquitous, immortal, perfect. He had, in the language of the seventeenth-century lawyers, a body natural in a body corporate and a body corporate in a body natural—whatever those phrases may mean. These changes in the conception of the king were accompanied by a series of assertions of executive autonomy, justified under the head of the prerogative. They formed the battleground between king and Parliament. The lawyers of both parties scrutinised Year Books, Parliament Rolls and Court Rolls in search of

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precedents and arguments. It is significant that there appears to be no single case—at least I have not been able to find one—in which the existence of the king's prerogative of prior payment was ever seriously questioned. Apparently it was too long established and too firmly footed to be open to attack, a matter to be regarded not as an appanage of executive power, but as an immemorial personal privilege.

The numerous cases which were decided in connection with this prerogative may be considered under three heads. First there were the cases which defined the extent of its ambit; secondly those which sought to formulate in words a legal theory which should embrace this and other feudal prerogatives in the scope of a convenient legal maxim. Thirdly those which stated its existence and endeavoured to give political or historical reasons for that existence.

Cases of the first class are concerned with a narrow issue. Where there are in existence simultaneously two writs of execution against a debtor, the one for the debt of a subject, the other for the debt of the king, to what extent and up to what stage in the subject's execution does the execution of the king take preference? The answer given by the Courts went to the utmost length in favour of the king. Till the debtor's property had been not only seized, but actually disposed of to a third person the king's execution would capture it. *Stringfellow* v. *Brownsoppe* (1) in principle concluded the matter. A subject creditor on a statute staple issued from Chancery a writ of *levari facias* under which the sheriff seized the debtor's goods. By the existing practice, when the sheriff made his return of seizure, another writ, known as a "*liberate*," issued authorising and commanding the sheriff to dispose of the goods. After seizure, but before the *liberate*, a king's writ of *extendi facias* issued from the Exchequer. It was held that the king's writ captured the debtor's goods even though such goods, after the first seizure, were in custody of the law. *Curson's Case* (2) is the converse; "*liberate*" had issued and so the Queen's claim was defeated. Analogously it was held that the king's writ was effective to capture goods already taken in distress by a subject (*R.* v. *Earl Dale* (3); *R.* v. *Cotton* (4); *Attorney-General* v. *Leonard* (5) and goods which had been seized under a commission of bankruptcy but had not yet been sold (*Attorney-General* v. *Capell* (6); *Brassey* v. *Dawson* (7)).

Only in regard to the validity of the king's writ against

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(1) (1550) 1 Dyer 67b.
(2) (1590) 3 Leonard 239.
(3) (1719) Bunbury 32.
(4) (1751) 3 Parker 112.
(5) 38 Ch. D. 623.
(6) (1687) 2 Shower 481.
(7) (1733) Strange 978.

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goods already seized by the sheriff under a *fieri facias* was there any dispute, and the dispute, as I have mentioned, arose from the terms of the Statute of Henry 8. The cases which bear on this matter are : *Coke's Case* (1) : *Attorney-General* v. *Capell* (2) ; *Smallcomb* v. *Buckingham* (3) ; *R.* v. *Peck* (4) ; *R.* v. *Cotton* (5) ; *Uppom* v. *Summer* (6) ; *Rorke* v. *Dayrell* (7) ; *R.* v. *Wells and Allnutt* (8) ; *R.* v. *Sloper and Allen* (9) ; *Giles* v. *Grover* (10).

Meanwhile the lawyers had been endeavouring to frame some principle, or at least some legal maxim, which would cover all cases in which the right or title of the king was preferred to the right or title of a subject, when the rights or titles came into conflict. The first nominate reporter to publish was Plowden and in the first volume of his Commentaries, at p. 258, is to be found the once famous case of *Hales* v. *Petit*. Sir James Hales, judge of the Common Pleas, was one of the judges who had decided *Stringfellow's Case* (11). Under Mary, owing to his religion, he fell into disfavour ; was imprisoned, recanted, obtained his release ; and finally, troubled in mind because of his recantation, walked out of his house in Canterbury and drowned himself in the Stour. The coroner's jury returned *felo de se* which involved forfeiture to the Crown of the felon's property, after office duly found by an inquiry under Commission from the Exchequer. The Crown sold the property to Cyriack Petit who entered into possession. It happened, however, that Lady Margaret Hales, widow of the judge, had held a close for an unexpired term as joint tenant with her husband. She promptly brought trespass against Petit alleging that her title by survivor was antecedent to that of the Queen. The Court held, after much interesting mediaeval and theological argument, that the Queen's title came first in time, but Weston J. went on to consider the case on the footing that the two claims might have arisen at the same moment and said : " although the forfeiture should only have relation to the death, at which time the title of the wife accrued, yet in this concourse of titles the King's title by prerogative shall be preferred." He justified his opinion by citing cases when the king's feudal rights to the land of an idiot prevailed over conflicting claims of the lord and of the tenant by courtesy. That the doctrine was not quite new may be gathered by the efforts of the widow's counsel to anticipate

(1) (1624) Godbolt 269.
(2) (1687) Shower 461.
(3) (1703) 5 Mod. 376.
(4) (1716) Bunbury 8.
(5) (1751) 3 Parker 112.
(6) (1779) 2 Bl. 1251, 1294.
(7) 4 T. R. 402.
(8) (1805) 16 East 278.
(9) (1818) 6 Price 114.
(10) 1 Cl. & F. 72.
(11) (1550) 1 Dyer 67b.

it in their argument. Weston's dictum was approved and re-stated in slightly different words in the *Sadler's Case* (1), after argument before the whole Bench of Justices and the Barons of the Exchequer. Two years afterwards Popham, Attorney-General, arguing in *Harris and King's Case* (2), repeats the proposition and in *Quick's Case* (3)—a contest between the queen and lord as to the right of wardship—the principle attains to the dignity of Latin: *Quando jus domini regis et subditi insimul concurrent jus regis praeferri debet. Hales's Case* (4) was cited as authority.

In 1655 in *Attorney General* v. *Andrew* (5) the maxim was invoked for the first time in a case of rival debts and executions. A creditor had issued against his judgment debtor writs of *elegit* and (apparently) had fully executed them. Subsequently another creditor of the same debtor assigned his debt to the king and process for the king's debt issued out of the Exchequer. The subject having obtained his judgment and completed his execution before the Exchequer process issued, he was, *prima facie*, protected by the statute of Hen. 8. To avoid this result it was sought to displace the statute by reliance on Weston's proposition, but the Court would not allow this. Parker B. says:—"The King's debt shall be preferred when it is in equal degree, otherwise not"; and Steel C.B.:—"The subject's title is prior to the King's and is executed."

Woodward v. *Fox* (6) does not concern debts, being a contest between the king on the one hand and a dean and chapter on the other, as to the right to appoint a register to an Archdeacon's Court, the existing appointment having been simoniacal within a statute of Edw. 6, and so bringing about a forfeiture. The maxim was applied in a variant form. "Nay, if the right lie equal between the King and subject, the King's title hath the preference by law, *detur digniori* is a rule, 9 Co. 24, in case of concurrence of titles, between the King and subject" (the correctness of the reference may be queried. 9 Co. 24 is the case of the Abbot of Strata Mercella which does not seem adequate authority for the proposition). *R.* v. *Wells and Allnutt* (7) was a contest between a subject, who had caused execution to issue on a *fi fa* under which the goods of the debtor had been seized, and the king, who had issued subsequently a writ of extent. Macdonald C.B., after holding that the statute of Hen. 8 did not affect the priority of two executions subsisting at the same time, dealt with the actual prerogative which he

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(1) (1586) 4 Coke 55.
(2) (1590) 3 Leonard 242.
(3) (1611) 9 Coke 129.
(4) 1 Plowd. 258.
(5) Hardres 24.
(6) (1691) 2 Ventris 267.
(7) (1805) 16 East 278.

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held to exist in such a case and which he found to depend on a principle "determining a preference in favour of the crown in all cases, and touching all rights of what kind soever, when the crown's and the subject's right concur, and so come into competition. I take it to be an incontrovertible rule of law, that when the king's and the subject's title concur, the king's shall be preferred. The books are full of instances to that effect." By this case the prerogative of priority in payment of debts is at last safely pigeon-holed in the proposition enunciated by Weston J. in *Lady Hales' Case* (1), a proposition originally evoked to deal with incidents of feudal tenure. In *Attorney-General* v. *Leonard* (2) Chitty J. followed this judgment of Macdonald C.B. and emphasised its general application.

It remains to consider the third class of authorities bearing on this prerogative, those in which some attempt is given to provide reasons for its existence. The reasons suggested, if they are meant to provide an explanation of its origin can hardly be taken seriously ; but, as explanations why the prerogative continued to exist, and escaped questioning or attack, they probably reflect with some accuracy the changing political thought and theory of the times when they were expressed.

Coke and Plowden were reputed the two greatest lawyers of the sixteenth century and they were united in arguing *Harbert's Case* (3) (as appears from the concluding paragraph of the report). The Court, in the course of the case, commenting on the king's prerogative of enforcing his debt by triple execution, against the goods, lands and body of his debtor, assign as a reason "*Quia thesaurus regis est vinculum pacis et bellorum nerui.*" Coke, who was fond of quoting, and if necessary inventing, Latin maxims may have been the originator of the saw. If so, he was to find it to his purpose in his own case against the heirs of Sir Christopher Hatton in 1624: Godbolt 289. The case is unusually authoritative for, because of the amount at stake and the importance of the issues, a special court was convened consisting of Dodderidge J., Tanfield L.C.B., Hobart L.C.J., Common Pleas, and Ley L.C.J. of the King's Bench. Dodderidge, who gave the first judgment, states in detail the four special prerogatives which are given to the king for recovery of his debts, namely, the right of triple execution, the right of priority, the right to call upon a debtor of the king's debtor to pay direct to the king, and the right of claiming an account against executors. He continues :—

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(1) 1 Plowd. 258.

(2) 38 Ch. D. 622.

(3) (1584) Co. 3 Rep. 12b.

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" Upon these cases vouched by me, I make divers observations. 1. I observe that from age to age what care the Judges had for the advancing and the recovering of the King's debts ; because *Thesaurus Regis est vinculum Pacis et Bellorum nervus* and it is the flowing fountain of all bounty unto the subject. 2, I observe, that the King hath a prerogative for the recovery of debts due unto him. 3, I observe, that although the debt due to the King be puisne or the lesser debt, and although the debtor be able and sufficient to pay both debts . . . yet the King's debt is to be first paid." The other judges were in agreement, and Hobart L.C.J. remarks :—" Every thing for the benefit of the King shall be taken largely, as every thing against the King shall be taken strictly ; and the reason why they shall be taken for his benefit is because the King cannot so nearly look to his particular, because he is intended to consider *ardua regni pro bono publico.* The prerogative law is not the Exchequer law, but it is the law of the realm for the King, as the common law is the law of the realm for the subject : the King's Bench is a Court for the pleas of the Crown, the Common Pleas is for pleas between subject and subject, and the Exchequer is the proper Court for the King's revenues." It is to be noted that debts due to the king are regarded as appertaining to his " particular," that is to say, to his personal and private property.

Four years afterwards in 1628—the year of the Petition of Right—Coke published his treatise on Littleton and in it he twice refers (at 90b and 131b) to revenue prerogatives and gives the Latin maxim, slightly modified (*firmamentum belli et ornamentum pacis*) as furnishing a reason for their existence. In the first passage he adds :—" It is intended that the King was busied about the publicke for the good of the common-wealth, and had not leisure to call his accountant to make his account."

Those reasons reflect a growing feeling that such an exceptional class of privileges requires some justification and some reconcilement with the public interest. They are clearly fictitious as explanations of the origin of the privilege, though they may serve as excuses for its retention.

In the eighteenth century it seems to have been felt that additional justification was desirable. Gilbert in his work on the Exchequer, at p. 113, says :—" By the king's prerogative at common law, if there had been an execution at the subject's suit, and afterwards an extent, the execution was superseded till the extent was executed ; because the public ought to be preferred to private property ; and the rather because the king is supposed by public business, not to be able to take care of every *private* affair relating to his revenue, and therefore no time occurs to the king; and if he was to be prevented of his execution, by another person coming in before him laches must be imputed to him, which the law does not allow."

Parker C.B. in *R.* v. *Curtis* (1) is content to rest on the Latin maxim but Lord Kenyon in *Rorke* v. *Dayrell* (2) speaks of " the prerogatives of the Crown, existing in the Crown for the public good; for the prerogatives are not given for the personal advantage of the King, but they are *allowed to exist* because they are beneficial to the subject. They are, therefore, to be guarded on account of the public; they are not to be extended farther than the laws and constitution of the country have allowed them; but within those bounds they are entitled to every protection."

"Allowed to exist" is accurate language and represents the true position in regard to the prerogative as a whole at the date the words were spoken.

The nineteenth century shows a further advance. In *Giles* v. *Grover* (3), Alderson J., after adopting the argument that the king is so occupied in public business as not to be able to take care of every private matter relating to his revenue, gives as a second reason " that by the King is in reality to be understood the nation at large, to whose interest that of any private individual ought to give way " and refers to Coke's maxim as a representation of this viewpoint. To the same purposes is the language of Lord Macnaghten in *New South Wales Taxation Commissioners* v. *Palmer* (4), where, referring to the prerogative of priority, he says it is " perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community." In *Food Controller* v. *Cork* (5), Lord Atkinson gives a distinctly doubtful assent to the words of Lord Macnaghten as applied to Crown debts in general, and clearly does not agree with his proposition where priority is claimed for a debt of a business character; Lord Shaw expresses similar doubts even more forcibly.

The various dicta to which I have referred seem to me partially an expression of political outlook, partially a statement of constitutional reality at the time when they were uttered. They cast no light on the origin of the prerogative or as to its strict legal nature, but they do account for its survival, hardly restricted by the legislature, on the ground that, in the hands of the executive it serves a purpose advantageous to the community. Lord Atkinson and Lord Shaw stress the fact that the advantages to the community depend on the uses to which the prerogative of priority is put.

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(1) (1750) Parker 98.

(2) (1791) 4 T. R. 402, at p. 410.

(3) 1 Cl. & F. 72, at p. 93.

(4) [1907] A. C. 179, at p. 182.

(5) [1923] A. C. 647.

If we divert our eyes for the moment from the forms in which the prerogative was claimed and speak the language of political realism, not of legality, it is clear that the nature and uses of the prerogative have changed. The legislation which followed the flight of James 2, the rise of the Cabinet system, and the growth of constitutional conventions, transferred the executive power to the Ministers and the financial control to Parliament. Where, in law, the ministers were but the king's servants, in reality the king was bound to accept the advice of his ministers if pressed, and was the agent whereby the ministerial executive carried out its plans and functions. In theory the king was all-powerful; he could veto legislation and direct his ministers as to executive policy by direct injunctions and in his speech from the throne. But if he had attempted to exercise against the wishes of his ministers the extensive prerogative powers given him by strict law an immediate answer would have been given by political action and he would shortly have ceased to possess such powers. The king's prerogatives have become the prerogatives of the functional ministerial executive and have been retained by reason of their convenience for executive actions. To the ordinary citizen the change was masked by two factors; first the very deep and real loyalty felt towards the person of the king; secondly by the scrupulous care taken in all legal forms to preserve the fiction that the king was acting either in his immediate person or by his servants who were under his control and direction. An indictment was at the suit of the king. If it had been framed with "the State" or "The People" as prosecutor no Court would have entertained it. I need not give further instances as I have dealt with this feature of the British Constitution in *Comyn* v. *Attorney General* (1) and I will content myself with again referring to the words of Sir John Salmond thereon quoted at pp. 152, 153.

The king has long ceased in practice to have any personal interest in the receipts and outgoings of his Exchequer. Since George 3 successive sovereigns, in the words of the preamble to Civil List Acts, have been graciously pleased to signify to their faithful commons in Parliament assembled that they have placed unreservedly at their disposal the hereditary revenues, and that they are desirous that competent provision be made for themselves and their families;

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(1) [1950] I. R. 142, at p. 151.

and the Commons in return have "fully and voluntarily resolved to make such provision." Civil List Acts provide for payment of the hereditary revenues into the Exchequer there to become part of the Consolidated Fund. In return, payment to the king, his relatives and dependents. of the various annual sums set out in the Acts is authorised. But the legal ownership of the hereditary revenues is not affected. The Act merely controls their disposition.

The income from the hereditary revenues is but a small part of the inflow to the Exchequer. The bulk comes from the taxes and imposts voted by Parliament by annual, and, more rarely, by permanent legislation. An examination of this system of British public finance shows with what skill a procedure has been evolved which satisfies all the requirements of the modern state, and yet, at every step, preserves the legal theory that all public moneys are the property of the king in person, and so attaches to the Exchequer claims the royal prerogatives.

. American and European authorities have extolled the British system of public finance as at once the most elastic and the most efficient which has yet been devised. In its developed form it achieves three important political objects. The initiative in finance lies with the executive, the control with the popular house of the legislature, the auditing and examination is entrusted to an official who is independent of politics and whose tenure of office is analogous to that of the judiciary. To operate such a system it is not necessary to enlist the services of a king. An example of this is to be found in our existing financial system which in all practical essentials reproduces the British. If, however, there is no king in whom the legal ownership of state moneys is vested, the peculiar financial privileges attached by the prerogative to royal ownership cease to exist and must be re-created by specific statutory enactment.

Kennedy C.J. in *In re K., an Arranging Debtor* (1) and the late President in *In re P. C., an Arranging Debtor* (2) have already called attention to some of the forms and procedures adopted in Great Britain for the purpose of ensuring that all public funds are the property of the king, but it seems desirable to go somewhat more fully into the process so as to emphasise the contrast between the British and the Saorstat Eireann procedure.

The king opens each session of Parliament by a speech from the throne and this speech always demands a grant of money from the House of Commons as an annual supply for the public services, and intimates that detailed estimates of the amount required will be laid before its members. If further supplies become necessary during the session they are demanded by a special message from the king asking for pecuniary aid or a vote of credit. No money can be provided unless on an express demand from the king or, where a motion or a bill only incidentally involves a charge on public revenues, unless such charge is the subject of royal recommendation by the mouth of one of the king's ministers who sponsors the motion or bill. This procedure preserves the initiative of the executive.

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(1) [1927] I. R. 260.

(2) [1930] I. R. 306.

As soon as the estimates are presented, they are considered by a Committee of the whole House, known as the Committee of Supply, and relevant sums are voted by resolutions couched in the form, "That a sum not exceeding £ be granted to his Majesty to defray the charges [specified]." Next the House resolves itself into a Committee of Ways and Means which grants to the king out of the Consolidated Fund the sums already voted. It remains to give effect to the votes by legislation which takes the form of a Consolidated Fund Bill for interim supply and an Appropriation Act at the end of the session to grant the remainder of the sums voted and appropriate them to the various purposes therein set out at length.

These Acts are introduced by a special formula designed to emphasise the fact that the money is granted to the king in person. "Most gracious Sovereign, your Majesty's most dutiful and loyal subjects the Commons of the United Kingdom of Great Britain (and Ireland) in Parliament assembled toward making good the supply which we have dutifully granted to Your Majesty in this session of Parliament have resolved to grant unto your Majesty the sum hereinafter mentioned and do therefore most humbly beseech your Majesty that it may be enacted, and be it enacted."

The king's assent to these bills is also in a special form. "*Le roi remercie ses bons sujets, accepte leur benevolence, et ainsi le veult.*"

The money now belongs to the king and is payable to the "Account of His Majesty's Exchequer at the Bank of England."

But it cannot as yet be paid out. The king must authorise the payment of his own moneys. Accordingly a royal order has to issue under the sign manual. The form in 1921 ran :—" Whereas the several sums mentioned in the Schedule hereto annexed have been granted to Us . . . to defray the expenses of the Public Supply Services therein specified. . . . Our Will and Pleasure is that you do from time to time authorise the Governor and Company of the Bank of England (or the Governor and Company of the Bank of Ireland) to issue or transfer from the account of our Exchequer at the said Banks to the account of the persons charged with the payment of the said services such sums as may be required from time to time for the payment of the same, not exceeding the amounts respectively stated in the said annexed Schedule. Provided that such issues or transfers shall be made out of the credits granted or to be granted to you, from time to time on the account of our Exchequer at the said Banks by the Comptroller and Auditor General and shall not exceed in the whole the amount of credits so granted out of the Ways and Means appropriated by Parliament to the service of the said year." [Control and Audit of Public Receipts and Expenditure. Stationery Office Publication. 1907, at pp. 29, 30.]

Certain grants have been made pursuant to statute and are charged directly on the Consolidated Fund. These are paid out of the Exchequer account on the authority of the particular statute which granted them and by virtue of a Treasury requisition authorised under 29 & 30 Vict., c. 39, s. 13.

The same care is taken with regard to the procedure by which the Exchequer chest is filled so as to ensure that the inflow shall be in the form of a royal revenue. Some taxes are permanent under special statutes, but most of the revenue is granted annually by the annual Finance Act.

The Committee of Ways and Means first votes the various duties and taxes and the result of their votes is then embodied in the annual Finance Act. Here again use is made of a specially framed enacting provision which follows that of the Consolidated Fund Acts and Appropriation Acts, but contains the words, " towards raising the necessary supplies to defray your Majesty's public expenses and making an addition to the public revenue [we] have freely and voluntarily resolved to give and grant unto your Majesty the several duties hereinafter mentioned." The king's consent is given in the same exceptional formula as is used for Consolidated Fund and Appropriation Acts.

Certain minor sources of supply also flow into the Exchequer such as forfeited recognisances and bonds which have been taken to the king, but I have been unable to trace any source which is not marked out in some way or another as notionally and legally owed to the king. By these means the Exchequer has been preserved as a royal purse and the royal prerogatives are at service to facilitate the Exchequer debts.

From the foregoing review of the development of the prerogative of priority payment, and of the constitutional practice in matters of public finance as it existed in 1921, certain conclusions may, I think, legitimately be drawn :—

1. The prerogative originated in a period when modern conceptions of the nature of sovereignty and government had not yet arisen. The structure of society was still feudal ; property law was built on a feudal skeleton ; loyalty was an essentially personal matter ; the king was looked on more as a feudal overlord than as the embodiment of national power and aspiration ; and the royal revenues, feudal by nature, were regarded as the king's personal possession, which could be spent by him according to his personal desires and without restriction by ministerial or parliamentary interference.

2. When it was sought eventually to find a legal principle on which to base this prerogative the principle was derived from cases which were concerned with feudal incidents and the feudal law of property.

3. The right to have a royal claim satisfied in priority to all other claims was not confined to money debts, but attached to any right or title to any kind of property provided that the right or title was vested in the king. The prerequisites to its existence were (*a*) a pre-existing valid right or title to property and (*b*) that such right was in the king. The prerogative was an appanage of property and of the royal nature, not of executive power.

4. When in the seventeenth century the executive power of the king, and those prerogatives on which it was based, became the object of fierce criticism and attack, no dissatisfaction seems to have been expressed with the prerogative of priority payment. The king's attempts to raise money for himself by novel expedients were indeed resisted, but it seems to have been accepted that, once property was his, the ancillary prerogative rights attached by the very nature of the ownership.

5. Although control over the raising and expenditure of public moneys gradually passed to the ministerial executive and the House of Commons, it seems to have been considered necessary to preserve with exact care forms and practice which were effectual to vest the legal ownership of such property in the king, and one at least of the objects of such preservation was to retain, for the benefit of real executive, the useful prerogative which attached to royal ownership.

These conclusions support and enable me to accept the first two propositions on which the President's judgment was based. The third proposition involves a close examination of the Saorstat Constitution and the constitutional practice which grew up while that Constitution was in force.

Before the consideration of the Saorstat Constitution can be approached, two preliminary difficulties must be resolved. How far, on the critical date, was the Constitution limited by the necessity of conforming with the Articles of Agreement for a Treaty signed by the British and Irish delegates on the 6th December, 1921? How far, if it was so limited, do the Treaty Articles modify those portions of the Constitution which bear on the question as to whether the public property and finance of Saorstat Eireann were, in the eyes of the law, so vested in the king as to attract the prerogative of priority?

The judgments of the Supreme Court in *The State* (*Ryan and Others*) v. *Lennon and Others* (1) have established that the validity of the Constitution of Saorstat Eireann is based solely on the Constitution of the Irish Free State (Saorstat Eireann) Act, 1922: Kennedy C.J., at pp. 203 *et seq.*, Fitzgibbon J., at p. 226, Murnaghan J., at p. 239. That Act was not an Act of the Oireachtas (which had not yet come into existence) but was a measure passed by the Third Dail sitting as a constituent assembly. It consisted of three short sections with two schedules, the first containing the Constitution, the second the Articles of Agreement for a Treaty. Sect. 2, which initiates the difficulty, is as follows:—

"The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as 'the Scheduled Treaty') which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any way repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State (Saorstat Eireann) shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty."

Well, that is plain enough. The Articles of Agreement for a Treaty are to control the interpretation and operation of the Constitution and the restriction remains so long as s. 2 of the constituent Act is in force. But in 1933 an attempt was made to repeal this section by s. 2 of the Constitution (Removal of Oath) Act, 1933 (No. 6 of 1933). Was such purported repeal effective? If I apprehend correctly the judgments in *The State* (*Ryan and Others*) v.

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(1) [1935] I. R. 170.

Lennon and Others (1) the Constituent Act and the Constituent Act alone gave validity to the Constitution and the Oireachtas is merely a creation of the Constitution and so of the constituent Act. I am unable to see how the creature can repeal or destroy the creator. I must assume that on the critical date the Articles of Agreement for a Treaty still controlled the Constitution.

I should perhaps advert to the contrary British view as expressed in *Moore* v. *The Attorney General for the Irish Free State* (2). On that view the validity of the Saorstat Eireann Constitution depends on an Act of the Imperial Parliament, namely, the Irish Free State Constitution Act, 1922. If this were correct then, after the passing of the Statute of Westminster, the Oireachtas would have been enabled to enact legislation abolishing restrictions imposed by an Act of the Imperial Parliament and so s. 2 of the Constitution (Removal of Oath) Act, 1933, would have been effective to repeal s. 2 of the Irish Constitution Act in so far as it was embodied and given legal effect in and by the Imperial Act. But after the decision in *The State* (*Ryan and Others*) v. *Lennon and Others* (1), it is not open to an Irish Judge to adopt the British view and I only mention it to show that I have not overlooked it.

Accordingly the Articles of Agreement for a Treaty must be considered. Of these only the first two are relevant.

Article 1 is as follows :—

" 1. Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace, order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State."

The first half of this Article which is the only part relevant to our enquiry, deals with status in general. Status is not form—indeed the forms of the constitutions of the various states enumerated in this Article vary widely. Status is a matter of international relations ; it is the position of a State as viewed from outside by other States, not as viewed from inside by its citizens. There is nothing in this Article to prevent the Constitution or the Oireachtas from adopting any desired method for providing for the ownership of public property.

Article 2 presents rather more difficulty. It runs :—

" 2. Subject to the provisions hereinafter set out the

(1) [1935] I. R. 170. (2) [1935] A. C. 484.

position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State."

Now, in 1921 the autonomy of the Dominion of Canada was restricted in various ways. It was subject to the supremacy of the Imperial Parliament by the Colonial Laws Validity Act, 1865; its Parliament could not pass laws having an extra-territorial effect; an appeal lay from its Courts to the Privy Council; the Governor General could refuse to assent to a bill and reserve it for the consideration of the king, and the king in giving or refusing his consent would be bound to act on the advice of his ministers in the United Kingdom; the Governor General was a representative of the king and took his instructions from the king, but those instructions would also ultimately have to conform with the advice given to the king by his ministers in the United Kingdom. Lastly, the king, on the advice of his ministers in the United Kingdom might disallow a law to which his Governor General had already given consent—though this restriction was probably already extinguished by constitutional usage. It seems to me that Article 2 was intended to impose on the new Free State those limitations on autonomy and restrictions of status at least until the law practice and constitutional usage of Canada was changed. But it was not intended to do more. It did not purpose in any other way to restrict the autonomy or legislative power of Saorstat Eireann and it was quite competent for the new state either by its Constitution, or by subsequent enactment, or by its procedure and the forms it adopted, to regulate its own finances and control its own property in any way it wished. It might adopt the British procedure of vesting property and finances in the king, with certain consequent advantages, but on the other hand, it might not; and in my view it did not.

The way is now clear to consider the Constitution and subsequent legislation and procedure. In attempting to interpret the Constitution it seems to me that certain preliminary considerations must be borne in mind.

The British Constitution, unwritten for the most part, had evolved slowly through the centuries by a process of gradual adaptation to changing circumstances. Its success in solving the practical difficulties of government was generally recognised and it had been reproduced with varying and necessary modification in the constitutions of the self-governing dominions. When the Constitution of the Free State was drafted, it also embodied most of the essential features of the developed British constitutional practice. It is natural, therefore, and perhaps necessary, to approach its interpretation in the light of the principles of British constitutional law and to seek guidance in cases decided on such law and in decisions of the Privy Council on the meaning of the constitutions of the self-governing dominions. In this procedure, however, there are many pitfalls. Similarity of verbiages between the two Constitutions, even if they are framed with an eye to a common model, does not logically compel similarity of interpretation when the historical antecedents and political genesis of the Constitutions differ widely.

The Saorstat Eireann Constitution was drafted by lawyers and there were lawyers in the constituent assembly which enacted it. When terms are used which are terms of legal art, they must, therefore, be given their proper legal signification. But it was also the fundamental charter of the new State meant to be read and understood by educated laymen, and, where the language is that of an ordinary educated layman, it would be wrong to attempt to divorce it from its plain and ordinary meaning in an attempt to make it conform to particular features of the British Constitution which a lawyer's preconceptions might suggest to him.

The property and finances of the State may be divided conveniently into three classes, 1, Territorial; 2, Moneys voted by the legislature and raised by taxes; 3, Miscellaneous.

First as to territorial revenues. The governing provision is Article 11 of the Saorstat Eireann Constitution:

"All the lands and waters, mines and minerals, within the territory of the Irish Free State (Saorstát Eireann) hitherto vested in the State, or any department thereof, or held for the public use or benefit, and also all the natural resources of the same territory (including the air and all forms of potential energy), and also all royalties and franchises within that territory shall, from and after the date of the coming into operation of this Constitution, belong to the Irish Free State (Saorstát Eireann), subject to any trusts, grants, leases or concessions then existing in respect thereof, or any valid private interest therein, and shall be controlled and administered by the Oireachtas, in accordance with such regulations and provisions as shall be from time to time approved by legislation, but the same shall not, nor shall any part thereof, be alienated, but may in the public interest be from time to time granted by way of lease or licence to be worked or enjoyed under the authority and subject to the control of the Oireachtas: Provided that no such lease or licence may be made for a term exceeding ninety-nine years, beginning from the date thereof, and no such lease or licence may be renewable by the terms thereof."

"Shall belong to the Irish Free State": that is plain ordinary language such as is used and understood by the man in the street. I am asked to interpret these words as meaning "shall be vested in the King who shall apply them for the benefit of the Free State," or, to borrow the phraseology of Canadian lawyers, "shall be the property of the Crown in the right of the Free State." It is certain that my hypothetical educated layman would not arrive at any such interpretation. He might note that by Article 12 the legislature was to consist of the king and two houses or that by Article 51 the executive authority of the Irish Free State was vested in the king, but this would not affect him. It is not the business of executive or legislature to own property, but to see to its management, as Article 11 indeed provides. I cannot conceive that the layman could give any interpretation to the words other than that they meant that the forms of property enumerated should belong to, and be vested in, the state which was to be an entity capable of owning property. He would not use the lawyer's phrase, "a juristic person," but he would probably be aware that in practically every continental country the state is regarded as something akin to a corporation which can exercise ownership.

Can a lawyer quarrel with this interpretation? Any lawyer familiar with the British Constitution when he came to read this Article would check at the words, "hitherto vested in the State." "Vested" is a term of art. The state as a juristic person was unknown to British law. It could not hold property. Public property was vested in the king, not in the state. It looks as if the words, "hitherto vested in the State," were chosen expressly to refute the suggestion that, at the time of the passing of the Constitution, any portion of the classes of property enumerated was vested in the king. Historical considerations enforce the view that this was the object of the words. The constituent Act was passed by the Third Dail, regarded as successor to the First Dail, which had met in January, 1919, and at its initial meeting had subscribed to two far-reaching documents, the Declaration of Independence and the Democratic Programme. The first of these proclaimed:—"We ordain that the elected representatives of the Irish people alone have power to make laws binding on the people of Ireland

and that the Irish Parliament is the only parliament to which the people will give its allegiance. We solemnly declare foreign government in Ireland to be an invasion of our natural right." The second laid down :—" We declare, in the words of the Irish Republican proclamation, the right of the people of Ireland to the ownership of Ireland. We declare that the Nation's sovereignty extends, not only to all men and women of the nation, but to all its material possessions, the nation's soil and all its resources." Now, in 1922, the " the elected representatives of the Irish people " had come together " to enact a constitution for the Irish Free State (Saorstat Eireann)," and the preamble to the constituent Act ran as follows :—" Dail Eireann, sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of the Irish Free State (otherwise called Saorstát Eireann) and in the exercise of its undoubted right decrees and enacts as follows . . ."

It is difficult to avoid the conclusion that when the Third Dail enacted the words, " hitherto vested in the State," it was consciously endorsing the words of the Republican Proclamation and the Democratic Programme, " the Nation's sovereignty extends . . . to all its material possessions, the nation's soil and all its resources," and that when it provided that in future such property should " belong to the Irish Free State " it was ensuring that there should exist *de facto* in the future a state of affairs which the First Dail had declared to exist *de jure* in the past.

The word, " belong," would not give a lawyer much trouble. It is not a word of precise connotation in English law. It is vague enough to include a bare association as in the phrase, " passenger belonging to a ship " (*The " Fusilier "* (1)) ; a right of user (*Attorney-General* v. *Oxford Railway* (2)) ; or a bailment (*Sheane* v. *Wicklow County Council* (3)). It is not a word of art (*Maitland* v. *MacKinnon* (4)). Even in law, however, the ordinary and primary meaning imports full ownership (*St. Thomas's Hospital* v. *Hudgell* (5)). Where the primary legal meaning and the popular usage coincide, and there is nothing in the context to cast doubt on the meaning and much to enforce it, I can see no reason why a lawyer should hesitate to adopt it unless there is some binding authority to the contrary.

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(1) 3 Mo. P.C. 51.

(2) 31 L. J. Ex. 227.

(3) [1919] 2 I. R. 115.

(4) 32 L. J. Ex. 49, per Pollock C.B.

(5) [1901] 1 K. B. 364, per Wills J.

Such contrary authority there is in the form of a series of decisions by the Privy Council on the interpretation of the Canadian Constitution. Decisions of the Privy Council are not binding but they must always carry great weight and if they were shown to be truly *in pari materia* any lawyer would hesitate to depart from them. In my opinion they are not *in pari materia*. But they must be examined.

"In construing these enactments [3 & 4 Vict., c. 35 and the British North America Act, 1867], it must always be kept in view that, wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown." So said Lord Watson in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1). This case followed an earlier decision of *Attorney-General of Ontario* v. *Mercer* (2) and was followed in *Attorney-General of British Columbia* v. *Attorney General of Canada* (3) and in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (4).

In all these cases it was accepted by every party as axiomatic that, before the passing of the British North America Act, 1867, all public property in the several provinces was vested in the Crown. The matters in dispute arose out of the interpretation of the Act and the general effect of the decisions may be summarised in the words of Lord Watson in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (5) :—" The provisions of the Act of 1867 . . . nowhere profess to curtail in any aspect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces."

When the events leading up to the passing of the Act of 1867 are compared with those which presided over the birth of the Saorstat Constitution it will be seen how unsafe it is to base any argument on a mere resemblance of phraseology. Before their federation the Provinces of Upper and Lower Canada, Nova Scotia, and New Brunswick had already a long and varied history. For over a century they had enjoyed representative government and for over a quarter of a century had been entrusted with responsible government. But it was unquestioned that the prerogatives of the Crown existed as fully and were as extensive in the colonies as in Great Britain unless expressly limited by local law or statute. The initiative towards federation was taken by the provinces themselves and resulted, after conferences between their representatives, in the preparation of two elaborate series of resolutions—the Quebec Resolutions on Federation 1864 and the Westminster Palace Hotel Resolutions on Federation 1866. These resolutions provided the matter which was subsequently embodied in the Act of 1867. Resolution 1 was:—"The best interests and present and future prosperity of British North America will be promoted by a Federal Union under the Crown of Great Britain, provided such Union can be effected on principles just to the several Provinces." Resolution 2 declared that "The system of Government best adapted . . . would be a general Government charged with matters of common interest to the whole country and Local Governments [for the Provinces] charged with the control of local matters in their respective sections. . . ." Resolution 3 provided that "In passing a constitution for the General Government the Conference, with a view to the perpetuation of our connection with the Mother-Country, and to the promotion of the best interests of the people of this Province, we desire to follow the model of the British Constitution, as far as our circumstances will permit." The words quoted are the same in each set of Resolutions. When the Act of 1867 was drafted upon the lines laid down in the Resolutions it contained as its first words:—"Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom." Edward Blake, who was Minister for Justice in Canada in 1875 and enjoyed a great reputation as an authority on Canadian constitutional law, said of this preamble:—"A single line imported in the system that mighty and complex and somewhat indefinite aggregate called the British Constitution." It is not necessary to go so far. It is sufficient to say that the wording of the preamble and the historical foundation of the Act would be sufficient to make any Court lean in favour of such an interpretation of any doubtful provision as would produce correspondence with the principles of the British Constitution.

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(1) 14 App. Cas. 46.
(2) 8 App. Cas. 767.
(3) 14 App. Cas. 295.
(4) [1892] A. C. 437.
(5) [1892] A. C. 437, at p. 441.

Very different was the historical background of the Saorstát Eireann Constitution. It arose out of an armed revolt against British rule and the terms of a Treaty to put an end to hostilities. Of those who enacted it nearly all

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had been engaged in the revolt in one way or another and many had actually borne arms. There is not the slightest reason to suppose that "with a view to the perpetuation of the connection with the Mother Country" they desired "to follow the model of the British Constitution so far as circumstances permit." The admitted reproduction in the Constitution of many of the features of the British Constitution is more properly attributable partially to a genuine appreciation of the inherent excellence of those features, partially to the fact that the Constitution had much of the nature of a compromise between British and Irish views.

The limited interpretation of the word, "belong," in the cases to which I have referred is also explicable on narrower grounds. In several sections of the Act of 1867 (I instance ss. 109 and 113) the word, "belonging," is used to describe the nature of the interest in public property owned by the provinces at the time of the union. At such time the legal interest was admittedly vested in the Crown and only the beneficial enjoyment in the provinces. When the same word is used to define the interest of the provinces after the Union, it is natural to give it the same interpretation. The selection of the word may perhaps be traced to its use in 54 and 55 of the Quebec and Westminster Palace Hotel Resolutions, resolutions which were concerned with the division, between the Central and Provincial Governments, of the beneficial use of various items of public property and were not directed to constitutional theories of legal ownership.

For these reasons I do not think that the various decisions of the Privy Council to which I have referred have any bearing on the correct interpretation of the word, "belong," in Article 11 of the Saorstát Eireann Constitution, and I hold that this word was intended to confer full ownership, legal as well as beneficial, on the new State, which for this purpose was conceived as a juristic person capable of owning property.

The subsequent legislation dealing with public lands (State Lands Act, 1924 (No. 45 of 1924), State Lands (Workhouses) Act, 1930 (No. 9 of 1930) and Foreshore Act, 1933 (No. 12 of 1933)) certainly contains nothing to controvert this view, and it is pertinent to note that when Article 10 of our present Constitution was drafted the word, "belong," was used as the appropriate word to vest natural resources and public property in the new state as a juristic person.

The second class of public property—the moneys voted by the Dail and derived from taxes and duties imposed by the Oireachtas—must next be considered. The developed financial system of Saorstát Eireann was based on that which prevailed in Great Britain and followed British procedure in so far as it was necessary to secure the three paramount features, executive initiative, control by the popular House, and inspection and audit by an independent official. It varied, and purposely varied, in the forms used, and the effect of the variation was that at no stage did the public finances become, even notionally, the property of the king. It is only on careful examination that this becomes clear.

The framework is in the Constitution. The legislature consisted of the king, the Dail, and the Senate (Article 12) and the executive authority was vested in the king aided by an Executive Council (Article 51). Those Articles correspond substantially to ss. 17, 9 and 11 of the British North America Act. All revenues from whatever source arising, subject to such exceptions as might be provided by law, were to form one fund, and to be appropriated for the purpose of Saorstát Eireann in manner and subject to the charges and liabilities imposed by law (Article 61). A corresponding provision is to be found in ss. 102 and 106 of the British North America Act, though the federal nature of the Dominion required further complications to be introduced. The necessary fund was subsequently given the name of "The Central Fund of Saorstát Eireann" by s. 1, sub-s. 1, of the Adaptation of Enactments Act, 1922.

The initiative of the Executive was secured by two Articles. Article 37 (corresponding in substance with s. 52 of the British North America Act) provided that money should not be appropriated by vote, resolution, or law unless the purpose of the appropriation had in the same session been recommended by a message from the representative of the Crown acting on the advice of the Executive Council, and Article 54 laid on the Executive Council the duty of preparing estimates of receipts and expenditure for each year and presenting them to Dail Eireann before the close of the previous financial year. Article 37 was subsequently amended by the Constitution (Amendment No. 20) Act, 1933 (No. 40 of 1933), the effect of the amendment being to delete all reference to the Governor General and require the message of recommendation to come from the Executive Council, signed by its President. If my interpretation of the Articles of Agreement for a Treaty is correct then this amendment was valid.

The control of Dail Eireann was secured by Article 35 which gave to the Dail, exclusive of the Seanad, legislative authority in relation to money bills, and money bills were

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defined widely and carefully in a sense corresponding to the sense in which that term had been interpreted by British parliamentary usage. This provision goes further than s. 53 of the British North America Act, which only provides that a limited (though nevertheless wide) class of money bills shall originate in the House of Commons.

Adequate inspection and audit by an independent official is provided by Article 62 which required the appointment of a Comptroller and Auditor-General to control all disbursements and audit all accounts of moneys administered by, or under, the authority of the Oireachtas and security of tenure for this official is ensured by Article 63. Effect was given to the requirement by the Comptroller and Auditor-General Act, 1923 (No. 1 of 1923).

The signification of the king's assent to or dissent from a bill, and reservation of a bill for the signification of the king's pleasure is dealt with by Article 41 which corresponds to ss. 55 and 57 of the British North America Act, but there is no provision for disallowance by the king in Council after the Governor General has signified assent, such as was provided by s. 56 of that Act.

Within this skeleton it was possible to adopt forms and a procedure whereby public moneys should become royal property and attract prerogative rights, as was done in Canada, or forms and procedure which should avoid this result, as was done in Saorstát Eireann.

In Canada every session of the Dominion Parliament is opened by a speech by the Governor General, speaking on behalf of the king, and known as the Speech from the Throne, and in it the Governor General makes a specific demand for supplies from the House of Commons. This feature was not introduced into the procedure of the Oireachtas.

The procedure adopted for giving effect to Article 37 (before it was amended) was as follows: whenever it became necessary to appropriate money by vote, resolution or law, the Executive Council communicated to the Governor General the necessity and purpose of the appropriation and thereupon the Governor General returned to the Executive Council the required recommendation. Examination of the Dail records shows that the first of these messages was sent out on the 20th January, 1923, in connection with the provision, out of moneys to be provided by the Oireachtas, of remuneration to deputies of under sheriffs and bailiffs as required by ss. 1 and 2 of the Enforcement of Law (Occasional Powers) Act, 1923. The message, carefully guarded in its wording, runs :—" On the advice of the Executive Council and for the purpose of Article 37 of the Constitution I have to recommend that payment be authorised out of monies to be provided by the Oireachtas of expenses to be incurred in relation to the employment of Deputies for Under Sheriffs and Bailiffs of Under Sheriffs." Subsequent messages show a slight variation of form, the words, " that the necessary authority be granted for payment," or " that authority be granted for payment," being substituted for the words, " that payment be authorised." The recommendation might also, according to the circumstances, be " for payment out of monies to be provided by the Oireachtas " or " for issue out of the Central Fund or the growing produce thereof " or " for the creation of securities and charge on the Central Fund or the growing produce thereof." It is impossible to construe these careful messages " for the purposes of Article 37 of the Constitution " into anything like a demand for supplies. In any event they ceased after the passing of the Constitution (Amendment No. 20) Act of 1933.

The Financial Procedure of the Dail was prescribed by Orders 90 to 103 of the Standing Orders adopted in 1923 and Orders 101 to 112 of those adopted in 1926. All motions for aid, grant or charge on the public income or any charge on the people had to be considered first in a committee of the whole House, known as the Committee on Finance, which corresponded to the Committee of Supply and the Committee of Ways and Means in the British House of Commons, and not till the Committee had reported could any resolution or vote of the Dail be taken. In this Committee were considered the annual estimates, item by item, and in it they were voted. But whereas in the British Committee (as also in the analogous committee in the Dominion parliament and in the parliaments of the Canadian Provinces) the sums are granted expressly to " His Majesty " or " towards making good the supply granted to His Majesty," in the Committee of Finance the sums were granted without the insertion of any such words. Indeed no specific grantee is mentioned. Those grants were subsequently approved by the Dail—the approval being taken as a matter of course—and took legislative form in the Central Fund Acts and Appropriation Acts.

The form taken by those Acts is significant. There is nothing to lend the slightest colour to the suggestion that any moneys are being granted to the king. His name nowhere appears in title, preamble or enacting sections.

The first of these Acts was the Appropriation Act, 1922 (No. 3 of 1922). It is entitled, "An Act to grant and appropriate certain sums for the service of the financial year ending on the 31st day of March, 1923" and its enacting

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formula runs :—" Be it enacted by the Oireachtas of Saorstát Eireann." Subsequent sections authorise the Minister for Finance to issue out of the Central Fund and apply towards making good the supply granted for the service of the year a calculated sum ; to borrow on the credit of such sum ; to issue securities for the purpose of such borrowing ; and to provide for appropriation to the services and purposes specified in the Schedule. In the Schedule are set out the particulars of sums granted, and sums which may be applied as appropriations in aid in addition thereto, to defray the charges of the several public services specifically mentioned.

Central Fund Acts (like Consolidated Fund Acts) are passed to provide interim supply in the period of the financial year before the Appropriation Act has been passed. The first of these was the Central Fund (No. 1) Act, 1923 (No. 7 of 1923). Its long title is "An Act to apply certain sums out of the Central Fund to the service of the years ending on the 31st day of March," 1923 and 1924 ; its enacting formula is the same as that of the Appropriation Act ; and its sections authorise the Minister for Finance to issue out of the Central Fund and apply towards making good the services of the respective years the sums therein specified. Authority to borrow for the credit of the sums authorised and issue securities for the purpose of such borrowing is included as in the Appropriation Act, but there is no specified appropriation of any sum. Such appropriation remained to be made by the subsequent Appropriation Act.

The form taken by future Appropriation and Central Fund Acts followed these precedents, though minor differences were necessary in the title of Appropriation Acts where there had been already a Central Fund Act in the same session. The title of such Appropriation Acts is "An Act to apply a sum " (or " certain sums ") " out of the Central Fund to the services of the year " (or " years ") " and to appropriate the supplies " (or " further supplies ") " granted in this session of the Oireachtas."

A comparison with the British forms already given shows that the precatory preamble which earmarks the supply as granted to the king has been cut out, and all reference in the sections to the supply as having been granted to the king is carefully avoided. The result is to leave in the air the specification of the person or body to whom the supplies have been granted. The pointed exclusion of reference to the king seems to negative the king as grantee. The Minister for Finance is made a corporation sole by the Ministers and Secretaries Act, 1924, and is given the power to hold land for the purpose of the functions of his department which comprised the administration and general business of public finance, but he is not given any ownership in public funds. If it be necessary to find a grantee it seems to me also necessary to postulate as such grantee the state, conceived as a juristic person. But perhaps it is sufficient to say that the possibility of the king being grantee is excluded and that the annual supplies are not earmarked as his property.

The same picture is presented by the Saorstát Eireann Finance Acts. The preamble to the British Acts, which made it clear that the various duties were granted to the king, no longer appears in our Acts. The long title to the Act of 1923 may be taken as the standard form :—"An Act to charge and impose certain duties of customs and inland revenue, including excise, to amend the law relating to customs and inland revenue, including excise, and to make further provisions in connection with finance."

The forms used in Canada are totally different. Thus Canadian Appropriation Acts are entitled "An Act for granting to His Majesty certain sums of money for the public service of the financial year" and contain the preamble, "Most Gracious Sovereign—Whereas it appears by message from [name of Governor General] and the estimates accompanying the said messages that the sums hereinafter mentioned are required to defray certain expenses of the public service of Canada for the financial year ending . . . and for other purposes connected with the public service : May it therefore please your Majesty that it be enacted by the King's Most Excellent Majesty by and with the Consent of the Senate and House of Commons of Canada." In the Provincial legislation the form is similar.

It remains to consider the final step in the legislation—the consent of the king as signified by the Governor General. An inspection of the original bills preserved in the custody of the Supreme Court has disclosed some interesting facts.

Mr. Timothy Healy and Mr. McNeill used a special formula, written in their own handwriting, for giving the assent to Appropriation, Central Fund, and Finance Acts. "In the King's name I . . . Governor General of the Irish Free State, thank Dail Eireann for the monies granted and hereby assent to this Bill." For other bills the formula was :—"In the King's Name I . . . Governor General of the Irish Free State hereby assent to this Bill." The difference in the formulas would give some ground for an argument that the moneys had been granted to the king, but it is unnecessary to pursue the matter, for before the critical date the formula had been changed. Mr. Domhnall ua Buachalla signified the assent to all bills by means of an identical rubber stamp. "in ainm an Ri auntium-se Donal Buckley Seanaschal Shaorstát Eireann leis sin an in Bille seo."

In Canada the form used by the Governor General is a translation of the old Norman French, "In His Majesty's name His Excellency the Governor General thank his loyal subjects, accepts their benevolence and assents to the Bill."

The contrast between the formulas used in the Saorstát financial procedure and the formulas used in Great Britain and Canada is striking and cannot be accidental. I am unable to see how the Irish formulas were in any way adapted to make moneys or taxes, voted by the Oireachtas, the property of the king.

The Canadian procedure which I have noted helps to explain the case of *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1). There the Privy Council decided that public moneys of the Province deposited with the Bank by the Receiver-General must, on the liquidation of the Bank, be repaid in priority to the debts of ordinary creditors. It was accepted by counsel for both sides, and by the Court, that such priority would be enjoyed by moneys belonging to the Dominion, but it was sought to distinguish the position of moneys belonging to the Province, on the ground that the Lieutenant Governor of the Province was appointed, not by the queen, but by the Governor General of the Dominion and so was not in a position to be a vehicle of the prerogative. This argument was not accepted by the Court. It further held that the non-territorial revenues of the Province were vested in the Crown, on the analogy of territorial revenues, and because under the Act of 1867 the sovereignty of Her Majesty continued to be the same in the Provinces as it was before that Act. Taken in connection with the forms of financial procedure adopted in the Provinces, this decision appears inevitable; but it does not seem to me to have any bearing on the position in Saorstát Eireann where the non-territorial revenue voted by Parliament was not granted to the king.

Finally, the miscellaneous sources of revenue which form the third class must be considered. I do not propose to go through those in detail, for they are many and various. I am not satisfied that any of them continued to be the property of the king. Many are included in Article 11 under the heading of "royalties and franchises." In other cases the legislature took good care to destroy the royal claim. Thus recognisances formerly were taken in the name of the king and if forfeited belonged to him; now by s. 13 of the Criminal Justice Act, 1924, the form has been altered and the person who enters into the recognisance acknowledges himself bound to Saorstát Eireann which here again seems to be regarded as a juristic person. Revenue bonds also are no longer entered into with the king, but with the Minister for Finance, a corporation sole: Finance Act, 1924, s. 13.

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(1) [1892] A. C. 437.

From this survey of the Constitution, the subsequent legislation, and the forms adopted in the financial procedure I have come to the conclusion that the Central Fund of Saorstát Eireann did not possess the characteristics of a royal exchequer, that the king owned no property in Ireland, and that, therefore, the prerogative of priority payment which is dependent on the existence of a royal property, claim, or title had ceased to exist by the critical date. Accordingly, I accept the President's third proposition.

That this was the view of the legislature may be deduced from s. 38 of the Finance Act, 1924. The section is as follows:

"38.—(1) Every sum due in respect of a tax or duty now under the care and management of the Revenue Commissioners or which is by this Act or shall by any future Act of the Oireachtas be placed under the care and management aforesaid, and also every fine, penalty, or forfeiture incurred in connection with any such tax or duty, shall be deemed to be a debt due to the Minister for Finance for the benefit of the Central Fund and shall be payable to the Revenue Commissioners and may (without prejudice to any other mode of recovery thereof) be sued for and recovered by action, or other appropriate proceeding, at the suit of the Attorney-General in any court of competent jurisdiction.

"(2) Moneys due or payable to or for the benefit of the Central Fund shall have and be deemed always to have had attached to them all such rights, privileges, and priorities as have heretofore attached to debts due to the Crown."

Where a field of privilege, originally depending on the prerogative, becomes the subject of statutory regulation, the statute supersedes the prerogative, which is abolished to the extent of the supersession, even where the powers and rights conferred by the statute are less absolute and less beneficial than those conferred by the prerogative: *Attorney-General* v. *de Keyser's Royal Hotel* (1). When the field covered by the statute is not identical with that covered by the prerogative, it is a question of law and of construction whether the statute was intended to replace the prerogative in its entirety, or only to the extent which it expressly covers. The late President has held that s. 38, sub-s. 2, only applies to taxes and duties. There is much to be said

(1) [1920] A. C. 508.

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for the argument that the section as a whole was meant to abrogate the priority attached to Crown debts in general, while re-introducing such priority for the limited class of taxes and duties. Such a policy would be in line with the views expressed by Johnston J. in *In re W., an Arranging Debtor* (1), by the late President in *In re Aero Club* (2) and *In re P. C., an Arranging Debtor* (3) and by Lords Atkinson and Shaw in *Food Controller* v. *Cork* (4), that the assertion of a claim to prior payment in respect of debts of a business or mercantile nature savours of inequity. I do not decide that this is the intention of the section for the reason (amongst others) that the section seems to regard the priority of Crown debts as a thing of the past which had already ceased to exist. For this interpretation, there are three reasons. First, if the priority was still existing and so attaching to debts due to the Central Fund, there was no need to provide for such debts by statute a priority identical in nature. Secondly, if the priority existed up to the moment of the passing of the Act, there was no reason to provide that " moneys due or payable to or for the benefit of the Central Fund shall have *and be deemed always to have had* attached to them all such rights, privileges, and priorities as have heretofore attached to debts due to the Crown." Thirdly the phrase, " as have heretofore attached to debts due to the Crown," is not apt to suggest that such priorities were still in existence at the passing of the Act. " Heretofore " means " formerly," " before now," " in times past," and does not naturally connote a time continuing right up to the present. For the latter meaning the more correct word is " hitherto." If the legislature considered that the priorities of crown debts were still in existence the proper phraseology would be either " as now attach " or " as have hitherto attached."

As I have decided that the prerogative of prior payment did not attach to State debts in general on the critical date, it is unnecessary to consider the final question as to whether such a prerogative, if existing, was waived or negatived by the Act of the Commissioners in becoming members of a mutual insurance corporation, whose memorandum and articles insist on equal sharing of liability among its members. I am not satisfied that the question was fully argued, and will content myself with saying that I find considerable difficulty in reconciling the conflicting ideas of mutual insurance and of privileged priority of payment when things go wrong. They seem to me to be incompatible.

(1) [1933] I. R. 202, at p. 208
(2) [1939] I. R. 204.
(3) [1939] I. R. 306.
(4) [1923] A. C. 647.

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In the result I reject the claim of the Commissioners to be paid in priority to other creditors. The costs of the liquidator must be paid out of the assets.

From this decision the Commissioners of Public Works appealed to the Supreme Court (1).

The liquidator was not represented on the hearing of the appeal in the Supreme Court.

T. P. McCarthy, Senior Counsel, and *I. J. Kelly* for the Commissioners of Public Works and the Attorney General :—

It is submitted that the Commissioners are entitled to be paid their debt in priority to the claims of the other creditors of the Irish Employers Mutual Insurance Association Limited. That submission is based on two grounds, namely, 1, by virtue of s. 38, sub-s. 2, of the Finance Act, 1924, the debt of the Commissioners has attached to it all the rights, privileges and priorities which formerly attached to debts due to the Crown. This is, we submit, because the money payable to the Commissioners is clearly payable to or for the benefit of the Central Fund. 2, The debt due to the Commissioners is in the nature of a Crown debt and so has the priority of a Crown debt.

The debt due to the Commissioners is a debt due to the State and, if recovered, the entire amount will be paid to or for the benefit of the Central Fund which means that all the rights and privileges of Crown debts attach thereto. The Central Fund is the successor of the former Consolidated Fund. The financial procedure adopted in relation to the Central Fund is the same as that previously adopted in relation to the Consolidated Fund which was established by the Consolidated Fund Act, 1816. The annual Appropriation Acts are passed each year in order to apply a sum out of the Consolidated Fund for the purposes set forth in the Act ; the Finance Acts of each year were passed in order to feed this Fund and keep it supplied.

The above procedure is followed exactly in relation to the Central Fund. The Central Fund was established by the joint operation of Article 61 of the Constitution of Saorstát Eireann and s. 1 of the Adaptation of Enactments Act, 1922.

The Crown was, it is submitted, always entitled to have its debts paid in priority to all other debts. This, we submit, was by reason of its prerogative. The prerogative is the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown (Dicey's Law of the Constitution, 7th ed., 1927, at p. 420). Dicey

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(1) Before MAGUIRE C.J., MURNAGHAN, O'BYRNE and LAVERY JJ.

(op. cit., at p. 463) observes that the prerogatives of the Crown have become the privileges of the people. That, we submit, is the position in Eire at the present day. Those privileges entitle the Commissioners, as State servants, to be paid this debt before all others. It is in effect a debt due to the people of Eire.

The revenues of the Crown were merely moneys paid by the people in many and various ways for the object of the government of the country. These moneys were and are paid into the Consolidated Fund or, in Ireland, into the Central Fund. As the prerogative was the asset of the executive government, we submit that it now resides in the Government of Ireland.

As to our second proposition, namely, that the debt due to the Commissioners is in the nature of a Crown debt and so has the priority of a Crown debt, it is submitted that in this case the Commissioners contracted as agents for the State. It is, therefore, the State that is concerned in the enforcement of the debt here and we submit that the State has all the priorities and privileges which formerly attach to the Crown by reason of the prerogative at common law. Under s. 1 (ii) of the Ministers and Secretaries Act, 1924, the Commissioners are, we submit, constituted a sub-department of the Department of Finance.

The Commissioners, in carrying out the works in respect of which the policies concerned in this case were issued, were carrying out work authorised and required to be done by the State. Such works were authorised by the Appropriation Acts. (See, for example, the Appropriation Act, 1937, Sch. B, Part II, Votes Nos. 11 and 69.)

Under the Arterial Drainage Acts the Commissioners are authorised and empowered to carry out drainage schemes. Portion of the cost of any such drainage schemes is to be provided out of public moneys; Arterial Drainage Act, 1925, s. 6. In carrying out such a scheme it is submitted that the Commissioners are clearly acting as agents for the State and the debts due to them in such capacity are debts due to the State. A loan made to an occupier of land, although made by the Commissioners under s. 31, sub-s. 2, of the Land Law (Ireland) Act, 1881, was held to be a Crown debt and entitled to priority; *Attorney-General* v. *Howley* (1).

The moneys spent on the above Acts came from the Central Fund as did also the compensation which has been paid by the Commissioners on the failure of the Association to pay the same. The Association agreed to indemnify the Commissioners in respect of all such claims and have not done

(1) [1914] 1 I. R. 124.

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so. Therefore, it is submitted any moneys now payable under the policies are moneys payable to or for the benefit of the Central Fund.

[They also cited *In re Thompson & Co. (Carriers) Ltd.; McIntosh & Co., Ltd.* v. *Thompson & Co. Ltd.* (1); *Sharpley* v. *Hornsby* (2); *Campbell* v. *Hornsby* (3); *Murphy* v. *Soady* (4); *Mersey Docks Trustees* v. *Gibbs* (5); *Wheeler* v. *Commissioners of Public Works* (6); *Attorney-General and Commissioner of Public Works* v. *Howley* (7); *Irish Land Commission* v. *O'Neill* (8); *Mersey Docks and Harbour Board* v. *Llaneilian Overseers* (9); *Gilbert* v. *Trinity House Corporation* (10); *In re Woods Estate; ex parte Works and Buildings Commissioners* (11); *Dixon* v. *Farrer* (12); *Graham* v. *Public Works Commissioners* (13); *Roper* v. *Public Works Commissioners* (14); *Public Works Commissioners* v. *Pontypridd Masonic Hall Co.* (15)].

R. McGonigal, Senior Counsel, T. Teevan, Senior Counsel (with them *B. Walsh*), for opposing creditors:—

We oppose the claim of the Commissioners on five grounds, namely, 1, As the Company was being wound up by the Court it is submitted that there was no priority for Crown debts and therefore there is no priority for State debts; 2, The Commissioners contracted as principals, and not as agents; 3, The State debts are not entitled to the priority formerly enjoyed by Crown debts; 4, Any priority which may have existed was waived by the Commissioners when they entered into a commercial contract, whether mutual or not; 5, If there were any priority for this debt, it was waived by the Commissioners becoming members of a mutual assurance association.

It is submitted that the priority formerly enjoyed by Crown debts only attached in a case where a company was being wound up voluntarily, out of Court. Where there was an order of the Court for compulsory winding up it is submitted that no such priority could, or did, exist.

It is submitted that it is not open to the Commissioners to allege that they contracted as agents; it is clear from the policy that they contracted as principals and it is not now open to them to say that they merely were agents for the

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(1) [1932] I. R. 45.
(2) 2 I. C. L. R. 590.
(3) I. R. 6 C. L. 37, I. R. 7 C. L. 82, 540.
(4) 1 N. I. J. R. 255.
(5) L. R. 1 H. L. 93.
(6) [1903] 2 I. R. 202.
(7) [1914] 1 I. R. 124.
(8) [1915] 2 I. R. 66.
(9) 14 Q. B. D. 770.
(10) 17 Q. B. D. 795.
(11) (1886) 31 Ch. D. 607.
(12) 18 Q. B. D. 43.
(13) [1901] 2 K.B. 781.
(14) [1915] 1 K. B. 45.
(15) [1920] 2 K. B. 233.

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Minister or for the state : *Humble* v. *Hunter* (1) ; *Robertson* v. *Minister of Pensions* (2). Nowhere in all the transactions between the Association and the Commissioners was it ever suggested that they were contracting as anything other than principals. No mention of agency was made at all. [They cited *Sharpley* v. *Hornsby* (3) ; *Foster* v. *Hornsby* (4) ; *Stubber* v. *Hornsby* (5) ; *Malley* v. *Hornsby* (6) ; *Campbell* v. *Hornsby* (7) ; *Wheeler* v. *Commissioners of Public Works* (8) ; *Burrell* v. *Tuohey* (9) ; *Westropp* v. *Commissioners of Public Works* (10) ; *Murphy* v. *Soady* (11) ; *Attorney-General* v. *Howley* (12) ; *Cork County Council and Burke* v. *Commissioners of Public Works and Others* (13) ; *Graham* v. *Public Works Commissioners* (14) ; *Gilbert* v. *Corporation of Trinity House* (15) ; *Formby Bros.* v. *Formby* (16)].

It is submitted that this debt is not a tax or duty under the care of the Revenue Commissioners. Such taxes and duties are, it is submitted, the only type of debts which are entitled to priority as State debts : *In re P. C., an Arranging Debtor* (17) ; *In re Irish Aero Club* (18). The Crown debts enjoyed priority by reason of prerogative ; the prerogative does not now apply in this country : *In re P. C., an Arranging Debtor* (17) and *In re Irish Aero Club* (18). In 1922 the position of a prerogative had changed, but the underlying basis remained the same : *Liquidators of Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (19) ; *In re Reade* (20). It is submitted that, as far as the prerogative is concerned, once Article 6 of the Constitution of the Irish Free State set up a Central Fund, it was not a " Royal Fund " any longer. The prerogative had nothing on which to operate and so the provisions of the present Constitution could not carry the prerogative over to the present day, as it did not exist at the time of its enactment.

There is not now—and, it is submitted, there never was—any priority for Crown or State debts where a company is being wound up by the Court : *Food Controller* v. *Cork* (21). Where a corporation is interposed by the Crown or the State to do trading which the Crown or State could not do, it is

(1) 12 Q. B. 310.
(2) [1948] 2 All E. R. 767.
(3) 2 Ir. C. L. R. 590.
(4) 2 Ir. Ch. R. 426.
(5) 2 Ir. Ch. R. 449.
(6) 3 Ir. C. L. R. 381.
(7) I. R. 6 C. L. 37, I. R. 7. C. L. 82, 540.
(8) [1903] 2 I. R. 202.
(9) [1898] 2 I. R. 271.
(10) [1896] 2 I. R. 93.
(11) [1903] 2 I. R. 213 (footnote).
(12) [1914] 1 I. R. 124.
(13) [1945] I. R. 561.
(14) [1901] 2 K. B. 781.
(15) 17 Q. B. D. 795.
(16) 102 L. T. 116.
(17) [1939] I. R. 306.
(18) [1939] I. R. 204.
(19) [1892] A. C. 437.
(20) [1927] I. R. 31.
(21) [1923] A. C. 647.

submitted that it is not entitled to the same privileges as the Crown; *Kildare County Council* v. *The King* (1).

It is submitted that once the Commissioners enter into a commercial or mercantile transaction, such as the effecting of the policy in this case, they waive any privileges or priorities which might have attached by reason of the prerogative. No such claim was ever advanced until the case of *Food Controller* v. *Cork* (2), which case was ultimately decided against the Crown.

Finally, we submit that the Commissioners by becoming members of a mutual assurance association abandoned any claim they might have had to any priority. It is submitted that the Commissioners cannot have mutual rights and at the same time a privileged position in a case of insufficiency of funds to pay. [They also cited *Sanitary Commissioners of Gibraltar* v. *Orfila* (3); *International Railway Co.* v. *Niagara Parks Commission* (4); *Tamlin* v. *Hannaford* (5); *Attorney-General* v. *Leonard* (6); *Comyn* v. *Minister for Finance* (7); *In re K., an Arranging Debtor* (8); *The State (Ryan and Others)* v. *Lennon and Others* (9); *Moore* v. *The Attorney-General for the Irish Free State* (10); *St. Catherine's Milling and Lumber Co.* v. *The Queen* (11); *Attorney-General of Ontario* v. *Mercer* (12); *Attorney-General of British Columbia* v. *Attorney-General of Canada* (13).]

T. P. McCarthy, Senior Counsel, in reply.

Cur. adv. vult.

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July 3.

MAGUIRE C.J.:—

I have read the judgment about to be delivered by Mr. Justice Murnaghan. I agree with it and I have nothing to add to it.

MURNAGHAN J.:—

In a compulsory winding up, by Order of the Court, of the Irish Employers Mutual Insurance Association Limited, the Commissioners of Public Works in Ireland claimed priority of payment over the claims of ordinary creditors in respect of sums due on policies effected with the Association. Under the policies the Association was to indemnify the Commissioners of Public Works against claims under the

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(1) [1909] 2 I. R. 199.
(2) [1923] A. C. 647.
(3) 15 App. Cas. 400.
(4) [1941] A. C. 328.
(5) [1950] 1 K. B. 18.
(6) 38 Ch. D. 622.
(7) [1950] I. R. 142.
(8) [1927] I. R. 260.
(9) [1935] I. R. 170.
(10) [1935] A. C. 484.
(11) 14 App. Cas. 46.
(12) 8 App. Cas. 767.
(13) 14 App. Cas. 295.

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Workmen's Compensation Act and other Acts. The schedule to the policies showed the estimated numbers of employees covered and their estimated total wages as follows :—

	NUMBER EMPLOYED	WAGES
" Arterial Drainage Works . .	300	£25,000
Maintenance of Marine Works .	20	£500
Fishery Piers and Landing Slips .	50	£3,000
Employment Schemes . .	10,000	£241,000
Dublin Airport . .	50	£5,500
TOTAL .	10,420	£275,000 "

In the winding up, the Commissioners of Public Works claimed to be paid £21,353 7s. 5d. as being due upon the policies and the Commissioners claimed to be paid this sum in priority to all other claims.

The claim for priority was based upon two grounds, one of which can be dealt with briefly. This ground was based upon s. 38, sub-s. 2, of the Finance Act, 1924. This subsection reads :—

"(2) Moneys due or payable to or for the benefit of the Central Fund shall have and be deemed always to have had attached to them all such rights, privileges, and priorities as have heretofore attached to debts due to the Crown."

The provisions of s. 207 of the Companies Consolidation Act, 1908, and the decision *In re Galvin* (1) lead to the result that debts due to the Crown did have priority, and it is contended that the above s. 38, sub-s. 2, attaches the priority to moneys due or payable to or for the benefit of the Central Fund. It is true that the sums claimed by the Commissioners of Public Works would be for the benefit of the Central Fund, but there have been rulings of the High Court that s. 38, sub-s. 2, applies only to taxes and charges under the care of the Revenue Commissioners : see *In re Aero Club, Gillic* v. *Minister for Industry and Commerce* (2). The s. 38, sub-s. 2, follows upon a s. 38, sub-s. 1, dealing with money due in respect of tax or duty under the care of the Revenue Commissioners. Although the words used in s. 38, sub-s. 2—" Moneys due or payable to or for the benefit of the Central Fund "—are literally wider in scope than money due in respect of a tax or duty mentioned in s. 38, sub-s. 1, these words are, in my opinion, having regard to their allocation, merely a compendious way of describing

(1) [1897] 1 I. R. 520.

(1) [1939] I. R. 204.

the moneys dealt with in s. 38, sub-s. 1. In the words of the logician the meaning must be limited by the universe of discourse. It is further unlikely, even if it were constitutional, that a general rule of law would be altered by a provision in a Finance Act. In my opinion the Commissioners of Public Works can find no support for their claim to priority in this sub-section.

The alternative ground of claim for priority is that the sums claimed are in their nature Crown debts and that they have the priority of Crown debts. Mr. Justice Kingsmill Moore in an elaborate judgment has held that the former priority of Crown debts was based upon grounds which are no longer applicable in this State. He did, however, advert to the question "whether a prerogative if existing was waived or negatived by the Act of the Commissioners in becoming members of a mutual insurance corporation whose memorandum or articles would seem to insist on equal sharing of liability amongst its members." Although this latter point was not very fully argued in the High Court, it has been more elaborately developed at the hearing of the appeal and I think I should in the first instance consider if under it a principle of law exists sufficient to dispose of the point before the Court.

The Irish Employers Mutual Insurance Association seems to have built upon an optimistic theory that the premiums charged would be sufficient to pay working expenses and meet all claims. The only other source of money was a right to call upon members, but the maximum call in winding up was limited to £5. Under Article 10 of the Articles of Association it was provided :—"Insurances shall only be granted to such persons or classes of persons as shall from time to time be approved by the directors." Article 7 of the Articles provides that "every person shall be deemed to have agreed to become a member of the Company who insures with the Company."

The Commissioners of Public Works in Ireland are a body corporate and in respect of a limited number of the persons covered they were acting as principals. Much the greatest part of the risk attached to workers in employment schemes, and I think that it is accepted that so far as concerns these workers the Commissioners of Public Works merely acted as agents on behalf of the appropriate Minister. The Association which granted the indemnity was fully aware that the Commissioners of Public Works were merely agents of the Minister. They allowed the policies to be taken out in the name of the Commissioners of Public Works. I do not think it can be said that the Minister became a member

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of the Association under Article 7 of the Articles of Association. Even, therefore, if there should be mutuality amongst members and if this mutuality must lead to equality of treatment, I do not see how any such principle can be extended to apply to persons who are not members. Here the person insuring and becoming a member of the Association was allowed to take out an insurance for a disclosed principal. I am not satisfied that the principle of mutuality can be applied when the member insures, not for himself, but for a disclosed principal. If the Minister on whose behalf the insurance was made had a priority by virtue of prerogative, I do not see on what principle he can lose this priority.

Mr. Justice Kingsmill Moore has traced in his elaborate judgment the history of that part of the royal prerogative by which priority was given to debts due to the Crown. In the form of government developed in England the Courts were the Courts of the king and the judges of the Courts were the king's judges. Crimes were acts against the king's peace and the revenue derived from taxes and duties was granted to the king. The judges in very early times, owing to the pre-eminent dignity of the king, ruled that the claims of subjects could not come into competition with the right of the Crown and thereby awarded a priority of payment in favour of Crown debts.

In whatever manner the rules of law in force in Ireland came to be established they were adopted by Article 73 of the Constitution of 1922 if not inconsistent with the Constitution. Article 73 reads—" Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Eireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas." This Constitution set up three organs of government, the legislature, the executive and the judicature. The king was part of the legislature and was represented by a governor general. Article 2 of the Articles of Agreement for a Treaty between Great Britain and Ireland provided :—" Subject to the provisions hereinafter set out . . . . the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State."

Speaking generally, however, in my opinion the structure of the State was no longer in conformity with the British pattern. Under English law the Crown could not be sued

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in the king's court. The only remedy was by Petition of Right. This procedure has become obsolete here since 1924 at least and actions have been brought against Ministers representing the State. The Attorney General is no longer the king's attorney, but is now the attorney representing at first the State and afterwards the Republic of Ireland.

Article 61 of the Constitution of 1922 enacted :—"All revenues of the Irish Free State (Saorstát Eireann) from whatever source arising, shall, subject to such exception as may be provided by law, form one fund, and shall be appropriated for the purposes of the Irish Free State (Saorstát Eireann) in the manner and subject to the charges and liabilities imposed by law." This Article made the revenues of the State unlike the king's revenues in the former system, and I am of opinion that s. 38, sub-s. 2, of the Finance Act, 1924, was a new statutory enactment giving to certain state revenues a legal status which they would not have apart from this enactment.

It is unnecessary to trace further constitutional developments since 1922 up to the present time. In my opinion there is no room for that part of the prerogative which gave Crown debts priority of demand. In my opinion this appeal should be dismissed.

O'BYRNE J. :—

I have read the judgment prepared by Mr. Justice Lavery. I agree with it and I have nothing to add.

LAVERY J. :—

This is an appeal from an order of Kingsmill Moore J. made on the 18th October, 1951, declaring that the debt and claims of the Commissioners of Public Works rank for payment out of the assets of the Company in the same priority as the debts and claims of the other member creditors.

The Commissioners contend that their claim of £21,353 7s. 5d. is payable as a state debt in priority to the claim of all ordinary creditors of the Company, both members and non-members.

The Company is a mutual insurance association which has proved hopelessly insolvent. The Commissioners became and were a member of the Association holding two policies of insurance with it and their claim arises in respect of compensation for accidents to workmen employed by them the liability for which was covered by the policies.

The financial position of the Company can be broadly stated thus :—

Assets estimated at..	.. ..	£45.519
Liabilities		
Due to the Commissioners	..	£21,353
Due to member creditors	..	£52,284
Due to non-members..	..	£4,933
Total Liabilities	..	£78,570

In addition to these liabilities there are, or will be, heavy claims for liquidators' remuneration and costs.

The importance to the other creditors, if the claim made by the Commissioners is sustainable, is apparent. There will be little or nothing available to meet their debts.

The claim is rested on s. 38, sub-s. 2, of the Finance Act, 1924, and, alternatively, at common law on the royal prerogative to which it is claimed the State is heir.

These matters have been dealt with by Mr. Justice Murnaghan, but in my opinion a preliminary matter raised by counsel representing the ordinary creditors must first be dealt with. It is submitted that the Commissioners' claim being as members of an association for mutual protection under contracts embodied in the two policies of insurance, they are bound by, and must submit to, the conditions imposed by the Memorandum and Articles of Association of the Company and the terms of the policies which they have accepted.

It is necessary to examine the Memorandum and Articles, the proposal for the policies and the policies themselves.

The Company was incorporated in the year 1931, and though the Memorandum and Articles were later amended, it is agreed that the original Memorandum and Articles are those which apply. The Company is one limited by guarantee and without a share capital. Clause 3 of the Memorandum provides that the objects for which the Company is established are, *inter alia* :—

" (*a*) The mutual insurance of members of the Company against liability to pay compensation or damages to servants and workmen employed by them or their dependants and the insurance of such members of the Company against any risk incident to their trade or industry.

" (*b*) To carry on these branches of insurance business . . . . on the principle that all members insure each other on the mutual principle . . ."

" 5. Every member of the Company undertakes to contribute to the assets of the Company in the event of its being wound up while he is a member or within one year afterwards, for payment of the debts and liabilities of the Company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding up, and for adjustment of the rights of contributories among themselves, such amount as may be required not exceeding £5."

The Articles provide as follows :—

" 7. No person shall be capable of being a member unless he is, or is about to be, insured with the Company and every person shall be deemed to have agreed to become a member of the Company who insures with the Company, and shall continue a member so long as he continues to be insured with the Company."

" 12. All claims against the Company are enforceable against the Company and its property and funds only."

" 14. Except as otherwise provided by Article 13 [relating to transfer and firms and not material] the rights of every member shall be personal to himself and shall not be transferable or transmittable to any other person and shall cease absolutely upon his death."

Article 42 and succeeding Articles provide for the periodical valuation of the profits and liability for unexpired risks and for the setting aside of such reserves as the directors think necessary for meeting contingencies and the Company's liabilities.

Article 100, dealing with winding up, provides in part :—

" The debts and liabilities of the Company on claims under, or otherwise in respect of, policies issued out of any department of the Company [in fact there was only one department] shall be paid and discharged out of the balance of the funds of that department remaining after making thereout the payments hereinbefore mentioned [these are the debts and liabilities other than debts and liabilities under policies or contracts of insurance issued by the Company and the costs of winding up which are first payable] and if and so far as such sums shall be insufficient, out of any sums contributed by the members of the Company insured with the Company pursuant to clause 5 of the Memorandum."

Article 101 provides that any balance after discharge of liabilities shall be applied in recouping the members, *pari passu* and rateably, all sums contributed and that any balance shall be distributed among the members in such manner as shall be certified to be fair and equitable by an actuary nominated in the manner provided by the Article.

On the 26th February, 1937, the Commissioners by a notice addressed to insurance companies, including the Company, invited tenders for insurance against employers' liability in respect of workmen to be employed during the financial year commencing the 1st April, 1937.

The Company on the 8th March, 1937, submitted a tender quoting a net premium of £6,014 5s. 0d. to cover liability under common law, Fatal Accidents Acts, 1846 and 1859, Employers' Liability Act, 1880, and Workmen's Compensation Act, 1934, and any amending Acts.

This tender was accepted by the Commissioners on the 25th March, 1937, for—I quote the words of the letter—" Insurance against our liability in respect of accidents to certain workmen to be employed by us during the year ending 31st March, 1938, and more particularly described in the enclosed memorandum dated 26th February, 1937, on which your tender was based."

A policy was issued by the Company, dated the 6th April, 1937, in conformity with " the written proposal for membership and insurance " which is declared to be " the basis of the contract and to be considered to be incorporated therein."

The Commissioners—described as " the insured "—are recited as " carrying on the business of Commissioners of Public Works and no other for the purposes of this insurance."

The operative words of the policy, so far as material for the present purpose, are :—" It is hereby agreed that if at any time during the said period any employee in the insured's immediate service shall sustain any personal injury by accident or disease (as described in the Workmen's Compensation Acts) while engaged in the service of the insured in work forming part of or process in the business above mentioned and in case the insured shall be liable to make compensation for such injury under [the named Acts or at common law] the Association shall indemnify the insured against all sums for which the insured shall be so liable . . ." and for costs incurred.

Finally, it is declared that the policy is subject to the provisions of the Association's Memorandum and Articles of Association.

On the execution of this policy the Commissioners became or continued (for the Company had previously covered the risks) a member of the Association. In the following year, the same procedure was followed and a policy in similar terms, dated the 4th April, 1938, at a premium of, £7,693 11s. 10d. was issued to the Commissioners.

On the 4th July, 1938, an order was made for the compulsory liquidation of the Company under the Court and it is in these proceedings that the claim arises.

It is agreed that the whole claim of £21,353 arises in respect of compensation payable by the Commissioners to injured workmen employed by it under the Workmen's Compensation Act, 1934, in respect of accidents covered by the insurance policies.

The employment by the Commissioners in the course of which the accidents occurred fell into three categories; first, unemployment relief schemes; second, works under the Arterial Drainage Act, 1925, and the Barrow Drainage Act, 1927; and third, work on airports.

A distinction was made between these categories, that in one, the Commissioners were acting as principals under their own statutes and in the others as agents for the Minister.

In the view which I take, this distinction, even if valid, is immaterial.

Broadly, the position—which should be apparent from the documents I have quoted—is that the Commissioners being a member of the Company contracted with the other members of the Company for their mutual protection and insurance.

This protection was afforded and could only be afforded by and out of the premiums paid by each to the common fund and the contribution of £5 to be made to that common fund should necessity arise as it has done, and which, of course, could only be provided by premiums.

The claim made is that by virtue of the prerogative or by a statute (which, I agree with Mr. Justice Murnaghan, is inapplicable) the Commissioners are entitled to ignore the terms of the contract they entered into and to raid this common fund to an extent which deprives their fellow-members of the substance of the benefit they contracted for. It is contended that the Minister is not bound by the terms of the contract.

If he is not, how can he claim the benefit of it. His claim is only possible if made in right of the Commissioners' contract. He has no claim at all if he cannot make it in this way. Mr. McCarthy, for the Commissioners, relied on the case of *Montgomerie* v. *United Kingdom Mutual Steamship Association* (1) for the proposition that while a non-member cannot sue such an association a member may insure on behalf of others and there can be a liability to non-members through the hands of members. The articles of association in question in that case contained a provision that a member might insure "on behalf of himself or any other person."

The Articles here contain no such provision. Moreover, that case appears to make it clear that whatever rights non-members may have, they are subject to the conditions binding on the member through whom the claim is made.

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(1) [1891] 1 Q. B. 370.

It is said that the Commissioners could not waive the prerogative to which it is said the Minister is entitled without his authority and no such authority was shown to have been given.

It does not appear to me that any question of waiver arises. It is a question of what rights were acquired.

In any event, in my opinion, the Commissioners contracted as principals and not as agents. Every clause in the policies and proposal is carefully drawn to make this clear.

The liability out of which the claim arises is the liability of the Commissioners. If it is not their liability there is no insurance. The priority claimed is wholly inconsistent with the mutuality which is the basis of the whole contract.

In *Lion Insurance Association* v. *Tucker* (1), Brett M.R. explains the nature of mutual insurance associations and the position of their members.

At p. 188, he says :—" Now what is a man who has undertaken those relations ? [i.e., membership of a mutual insurance association] There is no doubt he is a member of the association, but he is something more, he is a person insured by some of the members of that association, and he is an insurer of some of the members of that association. Therefore, he is not only a member, but also an insurer and an assured, he is all three."

In that case, the association was divided into classes which explains the reference to " some of the members "—in the present case it would be " all the members."

In a later case (*United Kingdom Mutual Steamship Association* v. *Neville* (2)) Brett M.R., who had become Lord Esher, said :—" In the case of *Lion Insurance Association* v. *Tucker* (1) I stated that the business relation between the members was that they were in reality both insurers and insured ; but that business relation is carried out by means of a policy given under the seal of the association. The members of each class are insurers and insured as between themselves and the other members of the class."

As already quoted, clause 3 of the Memorandum of the Company provided that the business of the Company is to carry on insurance " on the principle that all members insure each other on the mutual principle."

In my opinion, for the reasons I have given, the claim made by the Commissioners to priority is unsustainable ; the order of Mr. Justice Kingsmill Moore was correct and should be affirmed.

(1) 12 Q. B. D. 176.

(2) 19 Q. B. D. 110.

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Solicitors for Patrick Cunningham, representing the general body of creditors: *Branigan and Matthews.*

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L. J. W.

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